

# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

No. 203.

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WESTERN UNION TELEGRAPH COMPANY, PETITIONER,

vs.

S. B. POSTON.

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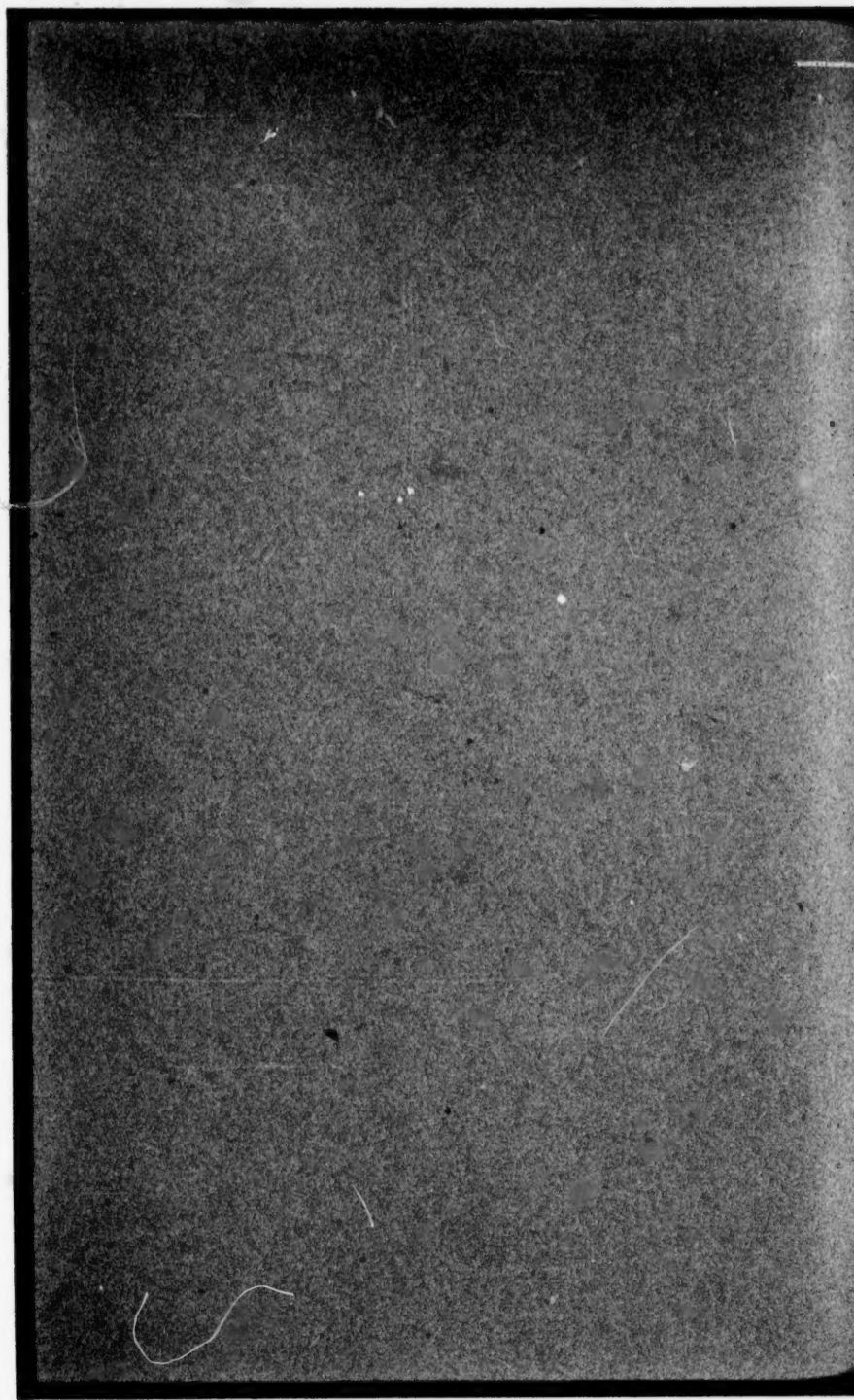
ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF THE STATE  
OF SOUTH CAROLINA.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 908.

WESTERN UNION TELEGRAPH COMPANY, PETITIONER,

vs.

S. B. POSTON.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF SOUTH CAROLINA.

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1 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, October Term, 1919.

S. B. POSTON, Respondent,

vs.

WESTERN UNION TELEGRAPH COMPANY, Appellant.

Appeal from Williamsburg County.

Hon. W. H. Townsend, Judge.

*Case.*

Willcox & Willcox, Francis R. Stark, Attorneys for Appellant.  
Arrowsmith, Muldrow, Bridges & Hicks, Attorneys for Respondent.

*Statement.*

This action was commenced in the Court of Common Pleas for Williamsburg County, South Carolina, on the 17th day of November, 1918, by the service of the usual summons and the complaint hereinafter mentioned.

2 The purpose of the action was to recover damages alleged to have been sustained by the plaintiff on account of the loss of a sale of two hundred bales of cotton, which loss he alleges was due to delay in delivering certain telegrams mentioned in the complaint.

The answer alleged for a first defense in substance a general denial and a specific denial that the defendant was operating a telegraph line at the time the cause of action accrued; for a second defense, that under the joint resolution of Congress, the Proclamation of the President, and the orders of the postmaster general, the defendant's telegraph line had been taken over by the United States Government and at the time the cause of action accrued, was being operated exclusively by the government; and for a third defense, that there was negligence in the transmission and delivery of the messages, but that the delay, if there was any, was due solely to the prevalence of an epidemic of influenza, which was an act of God.

The case came on for trial before Judge W. H. Townsend and a jury at the spring term, 1919, of the Court of Common Pleas for Florence County and resulted in a verdict in favor of the plaintiff for \$1,548.15. Judgment was duly entered on this verdict and within the required time, appellant served notice of its intention to appeal to this court.

As the principal questions raised by the appeal go to the very foundation of the case as made by the complaint and answer, as well as the testimony, it will be necessary to set these out in full, omitting the formal parts.

*Complaint.*

The plaintiff above named, complaining of the defendant herein, alleges:

1. That at the times hereinafter mentioned defendant  
3 Western Union Telegraph Company, was and still is a corporation created and existing under and by virtue of the laws of some State, unknown to plaintiff, owning, maintaining and operating a line of telegraph wires, instruments and offices, among other places at Johnsonville, in the County of Williamsburg, in the State of South Carolina, and in the City of Charleston, in said State, with which instrumentalities it engages in the business of a common carrier of intelligence for hire from and between among other points the places above mentioned, the same being connected by direct wires.

II. That on the second day of October, 1918, the plaintiff, at Johnsonville, S. C., delivered to defendant the following message for immediate transmission and delivery to W. B. Ravenell and Company, Charleston, S. C., to wit:

"W. B. Ravenell & Co., Charleston, S. C.:

"Wire best offer you can get Two Hundred Bales Cotton.

"S. B. POSTON."

III. That said defendant received and accepted said message for immediate transmission and delivery at 12:20 p. m. o'clock on the said second day of October, 1918, and although it maintains a direct wire to the City of Charleston and notwithstanding that the office of the addressee is near the office of the defendant in said city and well within its established free delivery zone, yet still the said message, through the negligence and carelessness of said defendant, its agents, servants and employees, was not delivered to said addressee until 4 p. m. o'clock on said day.

IV. That upon receipt of said message the said W. B. Ravenell & Co. made immediate efforts to secure a sale for the said two hundred bales of cotton referred to in said telegram and at 5:03 p. m. o'clock on said second day of October, 1918, filed with said defendant company, at its offices in Charleston, S. C., for immediate  
4 transmission and delivery to plaintiff the following telegram or message, to wit:

"S. B. Poston,  
"Johnsonville, S. C.

"Can sell two hundred bales thirty two one half cents, basis middling, landed Charleston, provided, all this year's crop, subject to prompt reply.

"W. B. RAVENEL & CO.

"Charge W. B. Ravenel & Co.—Rush."

V. That said defendant accepted and received the said message as aforesaid at 5:03 p. m. o'clock on the said second day of October, 1918, and although it maintains a direct wire from the City of Charleston to the Town of Johnsonville and notwithstanding that the office of the addressee is within less than two hundred yards from the office of defendant, at Johnsonville, and within its established free delivery zone, and notwithstanding the importance of the said message and the notice afforded by its contents and the written request to "Rush" typewritten upon the same, yet still the said message, by and through the negligence and carelessness of said defendant, its agents, servants and employees, was not delivered to the addressee, the plaintiff herein, until about 1 p. m. o'clock on the Third (3rd) day of October, 1918.

VI. That immediately upon receipt of said message the plaintiff, at Johnsonville, S. C., on the said Third day of October, 1918, at 1:24 p. m. o'clock, delivered to the defendant for immediate transmission and delivery the following reply telegram or message, to wit:

"W. B. Ravenel & Co.,  
Charleston, S. C.:

"Your wire. Sell two hundred bales which you have. Balance being shipped today and tomorrow.

"S. B. POSTON."

VII. That said defendant accepted and received said message for immediate transmission and delivery to addressee at 1:24 p. m. o'clock on the said Third day of October, 1918, and although it maintains a direct wire from Johnsonville to the City of Charleston, and notwithstanding that the office of the addressee is near the office of the defendant in said city and well within its established free delivery zone, yet still the said message, through the negligence and carelessness of the defendant, its agents, servants and employees, was not delivered to the address until 4:40 p. m. o'clock on the said Third day of October.

VIII. That during the several delays mentioned and set forth above, in the transmission and delivery of the said telegraph messages, above quoted, the cotton market had declined, the same being matter of which the defendant had notice at and during the time of the aforesaid delays, and, in the absence of the prompt reply upon which the sale of the aforesaid two hundred bales of cotton had been con-

gent and careless dereliction on the part of the defendant, with full knowledge of the damage and loss to the plaintiff which would and did result therefrom, the plaintiff lost the sale thereof at 33½ cents per pound.

IX. That during the aforesaid delays due to the causes and arising under the circumstances hereinbefore set forth the cotton market had so declined that plaintiff was forced to sell his cotton, to-wit: the aforesaid two hundred bales, for thirty cents per pound instead of thirty-two and one-half cents per pound, thus and thereby devolving upon plaintiff a loss of Two Thousand Six Hundred and Eighty and 23/100 (\$2,680.23) Dollars, which loss and damage was and is due solely and directly to the negligence and carelessness of said defendant in the transmission and delivery of the telegrams hereinbefore set forth.

6 Wherefore, plaintiff prays judgment against said defendant.

First. For the said sum of two thousand six hundred eighty and 23/100 dollars;

Second. For interest on said sum at the rate of seven per cent per annum;

Third. For the costs and expenses of this action and for such other and further relief as may be just and proper.

PHILIP ARROWSMITH,  
*Attorney for Plaintiff.*

November 12th, 1918.

*Answer.*

The defendant, answering the complaint, herein alleges:

For a First Defense,

1. That it admits so much of Paragraph 1 of the complaint as alleges that it is a corporation and that it owns and maintains a telegraph line between Johnsonville, South Carolina, and Charleston, South Carolina, but it denies that at the times alleged in the complaint it was operating said telegraph line on its own behalf or that it was engaging in its own behalf in the business of a common carrier of intelligence for hire between the said two points.

2. That it admits that a telegram similar to that described in Paragraph 2 of the complaint was filed in its office at Johnsonville, South Carolina, on the date alleged, but it alleges that in so receiving such message for transmission and delivery, it was not acting in its capacity as a common carrier but as an agent for the government of the United States of America.

3. That it denies the allegations of Paragraphs 3, 5, 7, 8 and 9 of said complaint.

7        4. That it admits that a telegram similar to that described in Paragraph 4 of the complaint was filed — it in its office at Charleston, S. C., on the date alleged, but it alleges that in so receiving such message for transmission and delivery, it was not acting in its capacity as a common carrier but as an agent for the Government of the United States of America, and that it denies the remaining allegations of said Paragraph 4 of the complaint.

5. That it admits that a telegram similar to that described in Paragraph 6 of the complaint was filed in its office at Johnsonville, South Carolina, on the date alleged, but it alleges that in so receiving such message for transmission and delivery, it was not acting in its capacity as a common carrier but as an agent for the Government of the United States of America.

#### For a Second Defense.

1. That by a joint resolution, bearing date July 16, 1918, the Congress of the United States authorized and empowered the President, whenever he should "deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine, cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war," and that just compensation should be "made for such supervision, possession, control or operation, to be determined by the President."

2. That thereafter, under and by virtue of the powers vested in him by the said resolution, and by virtue of all other powers thereto him enabling, the President of the United States, by a proclamation dated the 22nd day of July, 1918, took possession and assumed "control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto, whatsoever, and all materials and supplies."

8        3. That in and by said proclamation, the President of the United States directed that the "Supervision, possession, control and operation of such telegraph and telephone systems" thereby by him undertaken should be exercised by and through the Postmaster General, Albert S. Burleson, and that the said Postmaster General might perform the duties thereby and thereunder imposed upon him so long and to such an extent and in such manner as he should "determine, through the owners, managers, boards of directors, receivers, officers and employes of such telegraph and telephone systems," and that until and except so far as said Postmaster General should "from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers, and employes of the various telegraph and telephone systems" should con-

tinue the operation thereof "in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners or managers, as the case may be."

4. That at the times the messages set forth in the complaint were filed with the defendant for transmission and delivery, the said defendant was, and it is at the present time, operating its property for the Government of the United States, under the direction of Albert S. Burleson, Postmaster General, and it holds all current revenues of the company subject to the order of the said Postmaster General.

5. That by reason of the fact that at the time the said messages were filed for transmission and delivery, the defendant was not operating the property in its own behalf but solely in the behalf of the Government of the United States, the present cause of action cannot be maintained against it for the alleged delay in transmitting and delivering the said messages.

WILCOX & WILCOX,

*Defendant's Attorneys.*

*Testimony.*

S. B. POSTON, sworn.

Direct examination.

By Mr. Arrowsmith:

I live at Johnsonville. I raise and handle cotton there. I also buy and sell cotton.

Q. On the 2nd day of October 1918, did the Western Union Telegraph Company maintain an office at Johnsonville?

Mr. Davis: We object. That is question of law to be decided by the court.

Court: No, it is a question of fact.

A. They did.

Mr. Davis: I object on the ground that whether or not the Western Union maintained an office at Johnsonville is a question of law to be determined under the United States statute of July 16, 1918, and the proclamation of the President of July 22, 1918, thereon.

Court: Objection overruled, and the testimony admitted.

Q. You say they did?

A. They did.

Q. On that day, did you deliver a telegraph to the Western Union Telegraph Company at Johnsonville?

A. Yes, sir.

Mr. Davis: The same objection.

Court: The same ruling.

Q. Addressed to whom?

A. W. B. Ravenel and Co., Charleston.

Telegram from Poston to Ravenel and Co., dated at Johnsonville, S. C., 12:20 p. m., October 2, 1918, offered in evidence and marked Exhibit A.

10 I received a reply to that message on the 3rd of October. It was delivered to me about 11 o'clock, as best I remember, on October 3rd.

Telegram from W. B. Ravenel & Co. to S. B. Poston, dated at Charleston, 5:03 p. m., October 2nd, offered in evidence and marked Exhibit B.

Q. Did you at that time answer Mr. Ravenel's telegram?

A. I did.

Telegram from S. B. Poston to W. B. Ravenel & Co., dated 1:24 p. m., October 3rd, offered in evidence and marked Exhibit C.

At that time, I had in my possession cotton meeting the description contained in Mr. Ravenel's telegram.

Q. Tell us how you disposed of the cotton, and where it was?

A. When I wired Mr. Ravenel to get the best offer he could on 200 bales of cotton, he wired me back, I replied to the message as the telegram shows there, about the same day, and the message was delivered, but it was so late that he couldn't sell it at the offer he wired. The market continued on down for several days, and I had to sell and the result was I couldn't get but 30 cents, while if the message had been handled properly, I could have gotten 32½ cents.

I have made a calculation as to the amount which I would have received, or the damage that I sustained by reason of that fact. The figures set forth in the complaint are about right, I think. I don't remember. I think they are exactly correct.

Q. Now, Mr. Poston, after this delay in the transmission and handling of various telegrams, did you overhear a conversation between Mr. Gaitley at Johnsonville and myself?

A. Yes, sir.

Q. Who was Mr. Gaitley?

11 A. He was the agent of the Western Union Telegraph Company there or claimed to be. He was in their office. I remember that you asked him if the message was relayed to Charleston or sent direct or whether relayed at some other point of the W. U. Telegraph line, and he said he handled the message direct to Charleston.

There was nothing else I know of than the delay in these telegrams which prevented my selling these two hundred bales of cotton at 32½ cents. In other words, I thought I had sold until it was too late. No notice was given me by any agent or servant or employee of the Telegraph Company that these messages were accepted subject to any delays that might occur. In other words, the agent told men there he had delivered them. I asked him in the afternoon that I gave him the first message if he had gotten the message through and he said "I have," and, well then I didn't question why I didn't hear from Mr. Ravenel and the next day he brought me



his wire and I wondered at what was causing the delay, but never noticed it at the moment. As soon as I could notice it, I followed him back to the office and gave him a telegram, and at that moment I thought the cotton was sold, and loaded it and shipped it except what I had already shipped to him. I was not advised for some time after that that the cotton was not sold. I received a letter from Mr. Ravenel.

My place of business is, I suppose, about 150 yards from the office of the Western Union Telegraph Company in Johnsonville. They deliver telegrams there, have been delivering them to me.

I don't think there was a single case of influenza in Johnsonville on the 2nd and 3rd of October, the best I remember. The agent of the Western Union Telegraph Company was not at that time affected in anyway. I saw him and talked with him two or three times each day on the second and third days because I was interested in the cotton.

12 I know where both Mr. Ravenel's office and the Western Union office in Charleston are, but I do not know exactly the distance between. I judge it to be about two hundred yards, the best I could guess it—I believe about two hundred yards. I may be mistaken about that.

Cross-examination.

By Mr. Davis:

I don't know that I had a bale of cotton on storage in Charleston at that time.

Q. You said in the telegram to "sell two hundred bales you have." You had that in Charleston, didn't you?

A. No, sir. I didn't have two hundred bales in Charleston. I had shipped some to him already and I didn't know whether it had reached him, and I told him to sell what he had and the balance being loaded today and tomorrow—sell two hundred bales. I meant to sell two hundred bales—what he already had and the balance to be shipped today and tomorrow. This cotton averaged about five hundred pounds to the bale.

Q. This is not a question of average, but a question of absolute accuracy—the suit on your part is for the loss of two and one-half cents per pound and I want the exact weights.

— I can figure that up for you. The total is 43,350.

Q. So you are suing for 43,350 pounds at 2½ cents per pound?

A. I want the difference, what I was caused to have lost.

Q. That is the basis of your claim?

A. Yes, sir.

Court: That is the basis of your claim. The jury has got to have definite proof as to the amount of damages.

Mr. Davis: And part of our defense is that there was no such decline.

Court: In order to ascertain the amount of damages, you must

know the amount of pounds of cotton, and what was the difference.

13 A. Two and one-half cents a pound was the difference on basis middling. It was sold on the 18th of October, and I am suing for the decline in the market from the 3rd of October to the 18th. We did have an epidemic of influenza at Johnsonville. Business around Johnsonville while that epidemic was in progress was pretty dull. At that time the United States Government had to send two physicians to relieve the sickness and suffering in that community.

Q. And the conditions there were such on account of this epidemic late in the fall that the government had to take a hand in it?

A. I suppose they sent them there. Two came there and I understood they sent them and they were very much needed.

Q. As a matter of fact, the epidemic at Johnsonville was such that practically everything was suspended in the community?

A. Business was very dull, up and down, and it was pretty hard to handle. I don't remember whether the telegraph office there was closed. The agent there had the "flu" on one occasion, but had a man in his place, but I don't remember whether the office was closed or not. I don't remember whether a number of telegraph offices throughout the State were closed. At that time, I took two daily newspapers, The News and Courier and The State.

Q. You read The News and Courier constantly, don't you?

A. Yes, sir, pretty well.

Q. You were taking it in October, 1918, were you not?

A. Yes, sir.

Q. At the time you sent these messages?

A. Yes, sir. Mr. Ravenel finally sold the cotton for me. He had it in charge from the 3rd day of October, after it was shipped—  
14 I think I finished shipping the 3rd day, and he had it in charge from this on until it was sold and that was the 18th. I know cotton was declining between the 2nd and 3rd.

Q. Suppose I produce the official figures from the city of Charleston showing that there was no decline, will you still say there was a decline?

A. I don't think you could produce it.

Q. If I produce the official figures from the Charles Cotton Exchange showing no decline until Saturday of that week, will you still say it declined?

A. I know that it was in decline on New York.

Q. I asked you about Charleston; will you say in the face of those figures that it declined?

A. I say at that time.

Q. Will you attempt to discredit or dispute the figures of the Charleston Cotton Exchange?

A. No, sir, I don't know what they were doing.

Q. Do you know of your own knowledge anything about the Charleston market.

A. Only what I read in the paper from the cotton brokerage quotation.

Q. But nothing of your own knowledge. You were not there?

A. No, sir, I was not there. I don't know exactly what time that cotton arrived in Charleston. I don't remember how much was there when I sent the second telegram; in fact I had shipped some cotton a few days before I sent the telegram and had cotton on the platform at the time, had finished loading it and shipped it the 2nd or 3rd of October. I have sold a good many lots of cotton and shipped it after it was sold to the party and they handled it. I don't know when you got it there. I sent the bill of lading to Mr. Ravenel.

W. B. RAVENEL, SWORN.

Direct examination.

By Mr. Arrowsmith:

15 I am now and have been for 44 years in the cotton business in Charleston. I know what the Charleston Cotton Exchange is. I am a member of it. I am familiar with its rules and with its method of handling business. I am a member of the firm of W. B. Ravenel & Co., being the W. B. Ravenel, Sr., named there.

Q. On the 2nd day of October, did you receive this piece of paper from the Western Union Telegraph Company at Charleston?

A. I received it at 4 o'clock, and so recorded on there, that is my handwriting, recorded as being received at 4 p. m. As a result of that inquiry from Mr. Poston, I sent him an offer of 32½ cents for prompt reply. My answer was "Can sell two hundred bales 32½ cents basis middling landed Charleston \* \* \* subject to prompt reply," which means we must have answer that day if they are going to sell. I put that word "rush" on the telegram to make the telegraph company get it off immediately, to rush it. Carbon copy of message sent to Mr. Poston offered in evidence and marked Exhibit D. At the time I sent that telegram advising Mr. Poston that I would sell two hundred bales at 32½ cents, I had had an offer made for it. In other words, if I had gotten his reply, I could have sold it that afternoon at 32½ cents. I received a reply from Mr. Poston next day. It was received at 4:40, as appears from the record my bookkeeper put on the message at the time. The Cotton Exchange in Charleston closes at 3 o'clock. The first telegram was received at 4 in the afternoon. The last telegram was received at 4:40 in the afternoon and after the Cotton Exchange had closed.

Q. Answer me this question, whether or not you can always sell cotton on the Cotton Exchange in Charleston at the price appearing on the Cotton Exchange board in Charleston?

A. You cannot by a great sight.

16 Q. So, therefore, is it or not true that very frequently the price of cotton will remain at one figure, say for instance as in this case, 32½ cents, several days when, as a matter of fact you cannot sell cotton?

A. That is absolutely correct.

Q. Now in this case, when this cotton was received by you—I will ask this, did you continue to try to dispose of Mr. Poston's cotton at the best price you could get?

A. I can't say we went on trying to dispose of it, because the market was going down and there was no sale for cotton. I tried to dispose of their cotton, but there was no sale for it. You could not sell cotton you had; the market was declining.

Q. When was the first time you could sell Mr. Poston's cotton?

A. I think—whatever the date of sale is.

Q. That was the first time you had an actual market for that very cotton?

A. The date of that sale there. The spot market for cotton is controlled very much by the future market. The future market declined from 32.10 on October 2 to 29.92 on October the 18th, the day we sold that cotton. During that time there was no market for this cotton that we could sell on.

Q. Now look on the record and refresh your recollection and tell me when is the first quotation—or notation of cotton being sold on the Exchange in Charleston after the 3rd of October?

A. On the 3rd—on the 8th of October twenty-five bales reported as being sold.

Q. Do you know anything about the circumstances of the sale of that cotton?

A. I do not.

Q. Were you able to sell any at that time?

A. No, sir.

Q. Do you know the price at which that cotton was sold?

A. I see it reported at 31¼, but I do not know that it was sold at that time.

Q. Look ahead, please?

A. But I also see that the cotton futures market had declined very considerably, so I know—let's see, on this paper it says the market had declined a cent and a quarter.

Q. Tell us about the future market decline.

The Court: That book is the records of the Exchange?

A. Yes, sir.

The Court: Is that one of the reputable Cotton Exchanges of the country?

A. Supposed to be. What is the question?

Q. As to the condition of the future market on the date the twenty-five bales were sold, October the 8th, 1918?

A. The 8th, that was the date.

Q. The date that you said the first sales that you saw after October the 8th and you didn't believe they were sold for 31½.

A. I say I don't know. On October the 8th the market is quoted at 31¼.

Q. What is the spot or future market?

A. The future market for March cotton, on which we were basing it was 31.09.

Q. The spot market—

A. Wait a minute, that spot market ended at ten o'clock. It opened at 30.93 and went to 30.90 and back to 31.09 and back to 30.85 and then to 30.70 and 31.07 and closed at 29.93, variations in market during that day. Now, when the future market is still any time during the day, you can't tell what it may be——

Court: That is the price for cotton delivered where?

A. Delivered in Charleston. These are prices on the Charleston Cotton Exchange on twenty-five bales at 30 $\frac{1}{4}$ .

Q. Now, Mr. Ravenel, I want you to tell me with reference to the delivery of cotton, whether or not if a man would telegraph you, as Mr. Poston did in this case, to sell two hundred bales and would get them off in Johnsonville, what would be the limit of time you would have to deliver the bales of cotton?

A. The rule as I have always understood it in Charleston is ten days.

18 Court: What are the hours that you do business on the cotton exchange, buying and selling of cotton during the day?

A. From ten o'clock the Exchange is open until three, but you can sell in the afternoon if a man is willing to buy and run the risk of the market going against him in the morning. A man can buy cotton any time during the day, but the Exchange proper is closed at three o'clock, but if you want to sell in the afternoon and a man is willing to buy and take the chances, you can go ahead.

Q. Can you explain to me why it is that the cotton market may be posted at 32 cents in Charleston and the best actual price that you can get for it is, say 25 cents, whether that is the Cotton Exchange price that appears on the board?

A. God alone can tell you, I can't. I have seen prices there and the future markets which govern the spot market very considerably declined and yet leave the same price there and why, they did have that rule—I don't know whether it has been rescinded—the price once put upon the board could not be changed unless a sale of fifty bales had been made, and that was the rule at one time, but whether it was rescinded or not I don't know.

Q. Can you force any cotton exchange member to buy your cotton at the price marked on the board?

A. Not by a good sight. I wish I could.

Q. You testified you made the best sale you could for Mr. Poston?

A. Yes, sir, we did.

Q. I will ask you if this cotton was received in time to have made the delivery?

A. Oh, yes; otherwise we could not have delivered it on the sale we made, you see. I have no recollection of the exact time that this cotton was received. The cotton was there to be delivered, that was a fact; in fact, what date it came I can't tell you without my book before me. That is only a guess at it. I made the report of sales that Mr. Poston had, which I now identify. That is the cotton which was received by us. It was sold on the 17th of October basis 30 cents middling cotton. That is on our sales.

19 Q. We want to offer these bales in evidence, report of sales of two hundred bales.

Court: If you show the market price was different on the day that this cotton should have been sold, was different, why that price would govern. It may be the same as that. That simply goes in as tending to show that.

A. Here is the evidence of the Charleston Cotton Exchange on that day—30 $\frac{1}{4}$ .

Mr. Davis: I am not interested in that. I am interested in the 32 $\frac{1}{2}$  cents on October the 3rd.

Q. I will ask him about that and save you some trouble.

Mr. Davis: Go ahead.

Q. On the 3rd day of October, what was the Cotton Exchange board showing?

A. The Cotton Exchange on the 3rd of October was 32 $\frac{1}{2}$  cents for middling.

Q. Could you sell cotton for 32 $\frac{1}{2}$  cents middling on that day?

A. If I couldn't, I would not have made Mr. Poston the offer.

Q. That was the 2nd?

A. 32 $\frac{1}{2}$  cents.

Mr. Davis: I am not going to object. I want to state our position. If the market price that he testified to could not be had, if he could not sell in Charleston it was his duty to sell anywhere else in a reasonable distance where there was a market. Judge Smith in a recent case where they testified that there was no market in Augusta, the place of delivery, held that cotton was a staple and there was a market somewhere.

Court: Yes, sir, cotton is always worth something, and it is for the jury to say how much, and if the testimony shows or enables them to arrive at what it was worth when the telegram was received, and they were in a position to sell——

Mr. Davis: I don't want to be held down to this Charleston market.

20 Q. Do you know of any other place you could have sold this cotton on the 3rd?

A. No, sir; my experience—and I have been in business 44 years, and I have never seen it so hard to sell cotton as it was last fall. I suppose it was due to war conditions or something of the kind, and cotton was very hard to sell. It was running the same way—where I could sell against their future market when I wanted to, but in Charleston you could not, and my impression was that you could not do it in Savannah or Augusta either, very hard for them to handle the cotton business. The distance from our office to the telegraph office in Charleston is such that I could get there in about three minutes.

Q. Can you give me an idea of what cotton was actually worth, what you could have sold this cotton for on the 3rd? I don't mean the market price, but what could you have sold the cotton for?

Q. The difference in the price posted on the board——

Court: Yes, sir, but that is only evidence of the market price, that is, the market report, but if he knows what cotton was actually selling for that day?

A. None sold on that day.

Court: The day before and after?

A. All I know is that there wasn't anything doing at all. The market was on the decline and the buyers evidently thought they could buy cheaper and they held off. I have never seen such a scene in my life.

Court: It was worth something?

A. But you can't get a price and close it to your satisfaction. Cotton is only worth what you can get for it.

Court: Take the question what it was sold for before and after the 3rd. You can give the dates. The jury will have to calculate what it was on that day.

A. May it please your Honor, while a sale may be made it doesn't mean everybody can sell cotton on that day; a man may  
21 have twenty-five bales of cotton that he can sell to a particular man and it may be that you can go and sell that cotton at some price.

Court: But I don't have to go and give it away. The jury will be the judges.

A. The fact that a man can sell twenty-five bales of cotton does not mean that you can go and sell one hundred bales.

Court: No, sir, but that is some evidence.

A. You may go into the Exchange and you may find a man that had twenty-five bales that somebody will buy, and you can go and try to sell the same man and you can't. There is one thing and that is that you can't make a man take what he doesn't want. I made the best effort I could to sell this cotton.

Q. And the best price you could get for it was the price you did get for it?

No answer.

In the forty-four years that I have done business, I have gone out of Charleston to Savannah, and Augusta and other markets to dispose of the cotton I had. I haven't done it recently. I made no effort to sell this cotton on any other market. I do not know the rules, if any, between Charleston and Savannah.

Q. Is it the custom of the Exchange there when cotton is declining to call other exchanges to inquire if they can sell?

A. I don't. I don't know what the other people may do, but the man that I sell to, he may be trying them, and if he can't make a sale, he doesn't take my cotton.

Q. The people that you sell to in Charleston what do they do with it?

A. They sell it all around. If they won't take it, then it is because there is no sale for it on the market in Charleston and it is reasonable to assume that the brokers in Charleston cannot sell on other markets—reasonable to surmise they cannot.



22 Cross-examination.

By Mr. Davis:

Q. Under whose instructions did you hold this cotton for fifteen days without selling it?

A. Under whose instructions I did what?

Q. Did you hold this cotton for fifteen days without selling it?

A. Without anybody's instructions.

Q. On your own responsibility?

A. Yes, sir.

Q. And got caught with a low price and are now attempting to throw your responsibility on the Western Union Telegraph Company?

A. No, sir, it is the responsibility of the Western Union Telegraph Company.

Q. Why do you maintain that Cotton Exchange if it is not reliable?

A. You will have to ask the man who runs it.

Q. Aren't you a member of it?

A. Yes, but I don't run the Exchange.

Q. But you are a member of the organization and come and tell this court that its quotations are not to be relied on at all?

A. You asked me to tell you——

Q. Answer the question?

A. I don't think those cotton quotations are always reliable. Yes, sir, I don't hesitate to say so.

Q. Why do you maintain that organization?

A. I don't maintain it.

Q. Why do you allow your city to countenance an organization like that?

A. I don't maintain it. I am simply a member of it.

Q. Why don't you sever your membership?

A. I don't want to. It is my privilege to belong there, but at the same time, I can't rule the whole Exchange. I am simply one member.

Q. It is unreliable——

A. I have seen the figures on the Exchange when I didn't consider them reliable.

Q. Turn to the 2nd day of October and let us get some figures for this jury?

A. Give me your last date now.

23 Q. October the 2nd.

A. October the 2nd, at that time the cotton market was 32½.

Q. This was the telegram sent and that was the price that you wired him?

A. That was.

Q. Go to October the 3rd?

A. All right, that is quoted at 32½ cents.

Q. All right and——

A. That was why I couldn't sell.

Q. Did you try?

A. No, wait a minute; what was the use of trying something you knew you couldn't do when the market had declined in futures?

Q. Did you try?

A. No, sir, because—why should I try when his telegram wasn't given to me until 4:40 in the afternoon, after the Exchange had closed?

Q. Why did you tell me a minute ago that you didn't try because futures had declined?

A. I didn't sell only Mr. Poston's cotton. I have other cotton to sell.

Q. Go to the next date, the 4th?

A. 32½ cents—market still declining on futures.

Q. I was not asking about futures, but was asking you what spot cotton was quoted on that day?

A. 32½.

Q. And you are a member of that Exchange?

A. Yes, sir.

Q. And you help maintain it?

A. I am only a small member and not the committee that rules the quotations, and have nothing to do with that.

Q. And you mean to come to Williamsburg County and tell the jury here that your Exchange quotations in Charleston are unreliable?

A. If you want me to tell you the truth——

Q. Answer the question.

A. I am answering the question.

Q. Why do you maintain something that you now say is untrue?

A. I don't maintain it; I am simply one small member.

24 Q. You help it?

A. Only a member and there is a committee that runs its quotations, and I don't maintain that.

Q. Why don't you reform that committee or Exchange?

A. I am not there to reform that Exchange.

Q. You prefer to leave it to a committee?

A. The committee does the quoting and I don't have anything to do with it.

Q. And then come here and say that the quotations are unreliable?

A. I think so.

Q. Absolutely unreliable?

A. I didn't say always, nor most of the time, but sometimes they are.

Q. Tell me whether or not they were reliable on the 2nd of October and also on the 8th?

A. They may have been reliable on those two days.

Q. Didn't you handle some cotton on the 2nd of October by this Exchange?

A. On the 2nd of October?

Q. Yes, sir?

A. No, sir, I did not.

Q. You didn't sell Poston's cotton on the 2nd for  $32\frac{1}{2}$ ?

A. No, sir.

Q. How about the 3rd?

A. I see there  $32\frac{1}{2}$  for prompt reply and could have sold that afternoon, but his telegram did not get to me until the next day and long after the market was closed—at 4:40.

Q. And that was on that day?

A. Yes, sir.

Q.  $32\frac{1}{2}$  at the time you had the offer?

A. Yes, sir.

Q. And then on the 8th?

A. It was 30.

Q. The same price that you sold the 25 bales for?

A. What is that date?

Q. The 8th?

A. Oh, my sale wasn't on the 8th.

Q. I am talking about the bulk of cotton that was sold that Mr. Arrowsmith examined you about?

A. My sale wasn't on the 8th.

Q. I am not asking you about your sale, but about the sale Mr. Arrowsmith examined you about?

A. My sale was made on the 18th of October.

25 Court: He is asking you about a lot of 25 bales of cotton sold on the 8th. What price was that sold at?

A. 31 cents.

Q. What was the price posted that day?

A. 31 cents, the same price.

Q. Go to the 18th?

A. All right, as far as I can see  $30\frac{1}{2}$ .

Q.  $30\frac{1}{2}$ ?

A. Yes, sir.

Q. What did you get for your cotton that day?

A. 30 cents.

Q. Didn't get what the market showed?

A. No, sir.

Q. What did you sell the other for?

A. Exactly what I am telling you, that the Exchange quotations here are not what you can always get for cotton. This is very good proof of it.

Q. Go to the next sale?

A. All right, the next sale was 61 bales at  $29\frac{1}{4}$  on October 25th.

Q. Who sold that?

A. I don't know.

Q. Did you sell that?

A. No, sir.

Q. Did you sell all of that on the 18th?

A. I did.

Q. I thought you had made two sales?

A. No, sir, one sale.

Q. What effort did you make to sell that cotton on the 3rd?

A. Made no effort to sell it on the 3rd.

Q. What effort did you make to sell it on the 4th?

A. Made no effort because the thing was off. He had gone to work and asked me to get the best price for 200 bales on the afternoon of the 2nd.

Q. Because the thing was off—where was the other ten days you were telling the jury about?

A. I was only to sell, and you have ten days in which to deliver your cotton.

Q. And don't wait on the ten days at all?

A. We hadn't made any sale. That day I had an offer for 32½ cents for the 200 bales.

Q. On the afternoon of when?

A. On the afternoon of the 2nd at 4 o'clock, and after I saw the buyer and he said he would give 32½ cents, I wired Mr. Poston and the telegram was in the office of 5:03, and got no answer that afternoon, and the next day about 4:40 in the afternoon he says, "I will accept your offer," but it was too late.

Q. You never made any effort to sell it on the 3rd, nor did you go to that buyer and make an effort to sell it?

A. No, sir, his offer was for——

Q. Just come down.

Redirect examination.

By Mr. Arrowsmith:

Q. No, I will invite him down. You say that transaction was off?

A. Certainly it was off.

Mr. Arrowsmith: That is the plaintiff's case.

Mr. Davis: We move for a nonsuit on the ground that no damage has been proven. Their own witness says he made no effort to sell.

Court: The question is what he could have sold for, and I think it is a question for the jury whether or not there was any difference in the market, so I will have to refuse the motion.

*Defense.*

Mr. Davis: I hand you the Proclamation of the President of the United States, and then I hand you the order of the Postmaster General of August 1st, 1918, taking possession of the land lines.

Court: You introduce those in evidence?

Mr. Davis: And then the contract between the Western Union Telegraph Company and the United States Government.

Court: I will admit them.

Mr. Arrowsmith: We object to the introduction of the contract as his answer sets up no contract; and as far as the government having by the Act of Congress authorized the President to make this proclamation, is the law. It does not authorize any contract.

Court: I will rule it in evidence and rule on the effect of it afterward.

Mr. Davis: I have a paper which I am frank to say I don't think is competent. It is a construction of this statute by the Solicitor General of the United States.

Court: That cannot go in evidence at all.

Papers marked Exhibits 2, 3 and 4.

Mr. Davis: I think that completes all the record evidence that we have at the present time.

R. R. JERVEY SWORN.

Direct examination.

By Mr. Davis:

I am superintendent of the Charleston Cotton Exchange. I have the original records of the Charleston Cotton Exchange. Referring to these records, spot cotton was worth  $32\frac{1}{2}$  in Charleston on October 2, 1918. It was worth on October 3rd,  $32\frac{1}{2}$ . It was worth on October the 4th,  $32\frac{1}{2}$ . It was worth on October the 5th,  $31\frac{1}{2}$ . There was no decline in the market of spot cotton until the 5th of October. These are the official figures of the Exchange. These prices were made up by a committee, consisting of six members. Between 2 and 3 o'clock they get the quotations up and in fact I telephone around to different members and get it up and I get these prices—several prices and I give it to the chairman of the committee. The prices I get are turned over to the committee for making up the official quotations and are based on actual sales made that day.

Court: What did you say the price was on October 5th?

A. It declined to  $31\frac{1}{2}$  on October the 5th. I get these prices on actual sales made on any day. I telephone them to the chairman of the committee of six that makes up the quotation for that day, which is posted. All cotton sold in the city of Charleston is not reported in the Exchange. I know all the buyers there. I don't think they are all members of the Exchange. Sales have been made and never appeared on the Exchange.

Cross-examination.

By Mr. Arrowsmith:

The Exchange had a rule that when a price is put on the board it stays there until a fifty bale sale has been made, but it has never been followed. Whether followed or not, that is the rule. We have New York quotations on this Exchange.

Q. Mr. Davis asked you what spot cotton was actually worth on the 3rd day of October. Did you sell any?

A. No, sir. I have never sold any. I do not know what cotton is actually worth at any time except on the market. I don't sell any and don't know what it is actually worth. I do what I am told to.

Q. You are told to put the figures on the board?

A. Yes, sir.

Q. And told to leave them there until somebody else tells you to put something else up?

A. Yes, sir.

Q. I believe you testified to counsel that the quotations are made from actual sales?

A. Yes, sir.

Q. How do you put a quotation on a day of no actual sale, will you answer that?

A. Yes, sir. The quotation would not be changed until we got a sale.

Q. And then that is put on the board and stays there until a sale?

A. May have been sales made and not reported.

Q. So, therefore, as a matter of fact, you don't know anything about it, and as a matter of fact, the Cotton Exchange figures  
29 are not correct?

A. If the sales were made, it would have been reported and put on the board.

Q. And you would have them on the book?

A. Yes, sir.

Q. And when you go and see no sale made, you get no quotation in Charleston?

A. Yes, sir, and the quotation stands right there.

Q. Regardless of what the actual market, the quotation stands there?

A. It is arrived at by the committee.

Q. I am not blaming you.

A. I am telling you a fact.

Q. It is put on there Monday 32½ cents and stays until a sale and changed?

A. Every day the committee finds it out and approves it all and puts it on.

Q. Do you know when to call and where?

A. I have got to do that.

Q. You have got to call up the committee?

A. Yes, sir.

Q. You don't know what the committee do?

A. They give me the quotations to put on the board for that day.

Q. You don't know how they come at that?

A. Some of the members know from the rule of the Exchange what they ought to do.

Q. Now as a matter of fact, isn't this the case; doesn't the Cotton Exchange in Charleston always post a price higher than the cotton market in order to bull the New York Exchange?

A. No, sir; I don't think so.

Q. Don't you know that is the rule and when cotton is actually selling for twenty-five or six cents in Charleston that they have it marked 30 or 31 cents?

A. I do not know it.

Q. Will you deny it?

A. No, sir; I can not.

Q. If this committee probes it and finds out the sales and finds out what cotton is actually selling for, why are those sales not reported in that book? That is the official record, isn't it?

A. Yes, sir.

30 Q. Why is it you have got to take a copy when—as a matter of fact, what Mr. Ravenel said about the thing is absolutely correct?

A. They should give me the sales, but sometimes they don't.

— And therefore the thing is indefinite?

A. I don't know what they do about it at all.

Q. I will ask this—don't the members of the Cotton Exchange as a general thing take the same view of the authenticity of these quotations that Mr. Ravenel takes and that you have admitted is true?

A. What is that question?

Q. Don't the members of the Exchange take the same view of the authenticity of the quotations on the board that Mr. Ravenel has testified that his opinion was, and which you have admitted is true?

A. Yes, sir; I think so.

Q. You don't handle any cotton yourself?

A. No, sir.

Redirect examination.

By Mr. Davis:

Q. Did you understand Mr. Arrowsmith's question? Did you understand that the general committee in Charleston—not the general cotton people in Charleston—

Mr. Arrowsmith: That is not in reply to any question that I asked and I object.

Court: I didn't catch that.

Mr. Davis: Mr. Arrowsmith asked him didn't the members of the Exchange take the same view about it as Mr. Ravenel.

Court: If he knows, he can say so.

Mr. Davis: I am going to ask him the question if the general opinion was that it was a fraud?

Mr. Arrowsmith: I didn't say fraud.

Mr. Davis: That is what Mr. Ravenel testified.

Mr. Arrowsmith: No, sir, he didn't.

Court: You can ask him the question.

Q. Do those who are not members of the Cotton Exchange think it was a fraud?

A. I would not be connected with it if I thought it was.

31 Q. Would you be engaged in an institution like that?

A. No, sir, I would not.

Mr. Arrowsmith: I want to say here that Mr. Ravenel never made any such statement as that.



ANNIE MAY SMOAK, SWORN.

Direct examination.

By Mr. Davis:

My profession is telegraph operator. I work in the main office in Charleston. I handled one of the telegrams involved in this suit. It was number one, from Johnsonville.

Q. At the same time, look over those?

A. Yes, sir.

Q. Do you notice what operator handled those that you have?

A. Operator E. C.

Q. Who is that?

A. Miss Pearce.

Q. Where is she?

A. She is sick.

Q. At the present time?

A. Yes, sir.

Q. When was that telegram actually received in Charleston?

A. At 12:23 in the afternoon on the 2nd day of October.

Q. Does it show the hour that it was filed at Johnsonville?

A. Shows it was filed at 12:20.

Q. So it was three minutes on the wire from Johnsonville to Charleston?

A. Yes, sir. After I received the message, I placed it on the file. This is a wire hook, and the boys in the process of delivery get all telegrams from there. I do not know when that message was delivered.

Q. I will ask this—what was the condition, if you know, of the office in Charleston at that time with reference to the influenza epidemic?

Mr. Arrowsmith: We will object.

Objection overruled.

During the epidemic of "flu," we were up against it as our operators were, a great many of them, were out of the office.

We were very short of help during the epidemic of "flu." I don't remember when that started. Our help was very deficient during that time. I don't know anything about the delivery force, but the operators were short. I was in the operating department.

Cross-examination.

By Mr. Arrowsmith:

Our office was 145 East Bay street. That is where I was working on the 2nd and 3rd of October. No. 133 East Bay street is about one-half a block away, I suppose. The Western Union Telegraph Company about the 2nd and 3rd of October were remodeling the building.

Q. And that was the cause of a great deal of confusion in your office, wasn't it? Had the floor up, didn't they? Don't you recall that?

A. I am not in the delivery department, but in the operating department.

Q. You were a telegraph operator at the place where the instruments were? Was it not disrupted at the time—the 2nd or 3rd of October, and were you not in a great deal of confusion because of the fact that they were remodeling the office?

A. Where the instruments were?

Q. Yes, ma'am.

A. I don't recall that it was on that day.

Q. What about the delivery department: you don't know where it is?

A. No, I don't recall.

Q. But you do recall, or I will ask you, if you do recall from November the 17th—or from June the 18th to November the 17th, the Western Union Telegraph was doing business at both of those places because of the confusion called forth by the remodeling of its larger office; that is a fact, isn't it?

A. At some time we were remodeling.

Q. About that time? Between June and November?

A. I don't know what time it was. I can't recall when the influenza epidemic became prevalent in Charleston. I can recall when the operators were out. They were out during this epidemic of "flu." We had numbers of our operators out. I can't recall whether any of the operators were sick on the 2nd and 3rd of October. They were out of the office on the 2nd and 3rd, during the epidemic of "flu."

Q. You handled the wire from Charleston to Johnville?

A. I did on this message. I handled this message. There was no delay in regard to it. It was filed at 12:20 and I received it at 12:23. Influenza on the part of the operator could not have been the cause of the delay in delivering it to Mr. Ravenel as I received it at 12:23.

Q. And you did your part very promptly. What does this C. N. here represent?

A. That is the Charleston call.

Q. Can you tell me from looking at this telegram who sent it or handled that from Charleston?

A. That was sent from Johnsonville.

Q. You are unable to tell me what operator in Charleston sent that?

A. No.

Q. At any rate, would you venture the opinion that that operator did not have influenza?

A. Why, I am unable to say. I don't know about that.

Q. If he did have influenza, he was certainly working when he sent this telegram—that's true, isn't it?

Court: Speak out, if you know.

A. I am unable to say about that one.

Q. You are unable to say whoever sent this telegram here was working at the time he sent it?

A. What?

Q. That they were working at the time they sent this telegram and if they had influenza it was not sufficient to keep them from sending this telegram?

No answer.

Q. All right, I will ask you whether or not you will say you did not receive this telegram?

A. Suppose that shows that.

34 Q. Who sent it?

A. That was received in Charleston.

Q. I want to find out——

A. Where was it sent from?

Q. I am sure I don't know.

A. We never received or sent the message.

Q. Can you say you did not send this telegram?

A. My signature is not on it.

Q. But in the absence of that information, can you tell me whether you did send it?

A. I am unable to say.

Q. How many operators did they work in Charleston?

A. I am unable to say exactly.

Q. How many were sick on the 2nd of October?

A. I don't know.

Q. How many on the 3rd of October?

A. I don't know.

Q. Were any sick on the 2nd of October?

A. We had during the epidemic of "flu"—they were sick off and on during that entire time.

Q. Do you know when the epidemic of "flu" commenced in Charleston?

A. I can't say the exact date.

Q. Won't you say it didn't commence and was not obtaining on the 2nd or 3rd of October—won't you say that?

A. I am unable to say.

GEORGE A. McELVEEN SWORN.

Direct examination.

By Mr. Gilland:

I am engaged in the cotton and cotton seed business. I was a buyer of cotton during the month of October, 1919. Between the first and second days of October and the 18th day of October of last year, I bought several lots of cotton in Kingstree.

Mr. Arrowsmith: We object to any testimony as to what Mr. McElveen did in Kingstree.

Court: No, sir, but Kingstree is in proximity to where this cotton was in Charleston.

I bought it for Middleton & Co. in Charleston.

35 Q. What prices did you give for that?

A. I could read the prices for different dates. My invoice shows the prices for basis middling that I gave for cotton f. o. b. Kingstree, October the 1st—75 bales at 32 cents.

Court: What date was that?

A. October the 2nd, I sold 55 bales at  $31\frac{7}{8}$ ; and October the 4th, 53 bales at  $31\frac{1}{2}$ ; October the 7th, 40 bales at  $30\frac{3}{4}$ ; and October the 18th, my invoice shows here the date I purchased cotton that is reported that day, and I always bought the day a purchase shows, and take my delivery from the day, and October 18th I sold 100 to 120 and that was the outside. I was to deliver 120 that I agreed to, basis middling, Kingstree.

Q. What date was that?

A. October the 18th. They usually figure the freight at about 23 cents per hundred from Kingstree to Charleston, which would make about  $\frac{1}{4}$  of a cent difference per pound between Kingstree and Charleston. My purchase on the 4th was 53 bales at  $31\frac{1}{2}$  cents. That would be, according to my statement,  $31\frac{3}{4}$  Charleston. And the purchase on the 7th was  $30\frac{3}{4}$ . Between the 7th and 19th, I had made no purchase—I mean I sold no cotton but this 100 or 120 bales that was sold or was purchased between the 18th and this sale of 100 or 120 bales. The sales were to Middleton & Co., Charleston.

Cross-examination.

By Mr. Arrowsmith:

I buy cotton on the market and offer it. Sometimes I buy—get a little more from Middleton for round lots in 100 or 200 bales than he would give on a little basis middling, and I usually pick up the cotton and offer it to him. I buy it myself partly on my personal account, but not all of it. I sell to Mr. Middleton on basis middling.

Q. How do you sell it, what he will give you for it or what is marked on the Exchange?

A. I offer the cotton to Mr. Middleton on basis middling and he gives me a price and if he can buy it, I sell it to him.

36 Q. Regardless of what is marked on the board?

A. Yes, sir.

Q. I want to ask you if you have not seen the cotton market quoted in the newspaper in Charleston at a price you couldn't possibly sell for in Charleston?

A. Yes, sir.

Q. You have seen that several times?

A. Yes, sir.

Mr. Davis: We object to newspaper records. We haven't introduced anything of the kind, and it is hearsay evidence.

Court: He is showing the difference between the actual transaction and quotations.

The Stock Exchange book shows from October the 2nd to October the 8th on the Cotton Exchange in Charleston only 25 bales sold and showed no sales then until the 11th when 50 bales were sold. During that time I sold Middleton 55 bales on the 2nd, 53 bales on the 4th, and 40 bales on the 7th. I sold him again on the 18th—100 to 120 bales. That cotton when I sold it was on the market here in Kingstree. I always sell the cotton when I get it and get the bill of lading. I don't know how long it takes to deliver it. I get paid as soon as I get the bill of lading. I deliver it to the common carrier here and that is delivery to Mr. Middleton so far as I am concerned.

Q. Why was Mr. Middleton paying above the market for the cotton?

A. I don't know that it was above the market.

Q. You keep up with the market?

A. I look at my cotton data and know what it ought to be worth. I get quotations from the New York market every fifteen minutes. I get those every fifteen minutes and know what cotton ought to be worth. Unfortunately, New York fixes our spot prices. Spot prices are governed by future prices.

Q. I want to ask you why it was that Mr. Middleton was paying you higher than the future price, that is to say, for deliveries at that time?

A. I couldn't tell you that.

Q. Your deliveries at that time—the spot market at that time was based on March cotton?

A. I don't know what month it was based on.

Q. Don't you know that cotton—the spot market in October was based either on December or January so many points?

A. No answer.

Q. Why was Middleton & Co. paying you more?

A. I couldn't answer you why Middleton & Co. was doing that. I don't know anything about that. I know Middleton & Co. paid me for the cotton, what I had in it and that's all I expected.

WILMOT S. GILLAND SWORN.

Direct examination.

By Mr. Gilland:

I am in the cotton buying business in the fall. I was engaged in that business in October of last year. I bought and sold cotton on the local market in Kingstree between October the 2nd and 18th. I was the representative of Maybank & Co., Charleston. Between October 2nd and 18th, some days I wasn't in the market and some days I had sales between those dates. My basis at that time, I think

if I remember correctly, was so many points on December or January, I have forgotten. On October the 4th I bought 15 bales on basis of 30 $\frac{7}{8}$  middling. On October the 5th I had a limit on basis middling 30 $\frac{1}{2}$ , and I sold 29 bales that day. On the 7th and 8th—I had a limit on the 7th of 30 $\frac{1}{4}$  basis middling and I sold 16 bales. The Charleston market is supposed to be a  $\frac{1}{4}$  of a cent higher than the Kingstree market. That cotton was bought for or sold to Maybank & Co. of Charleston.

Cross-examination.

By Mr. Arrowsmith:

Q. It is in evidence that cotton was quoted on Charleston Cotton Exchange on October the 4th—you say on that date your market was 30 $\frac{7}{8}$ ?

A. That is the basis I have down here. On the 5th my basis was 30 $\frac{1}{2}$ . On the 8th my basis was 30 $\frac{1}{2}$  and in Charleston it was quoted 31 $\frac{1}{4}$  on the Exchange market on the board.

Q. Is it or not a fact that it is very frequently the case that you can't sell your cotton in Charleston?

A. I know nothing about it. I don't make sales in Charleston.

Sometimes I am taken off the market. I don't know the reasons I am taken off, unless it is no sales for that cotton or unless operating on the decline of the market. I have seen cotton quoted in the Charleston News and Courier at a very much higher price than I was able to get for it here or dispose of it in Charleston. These were Charleston Cotton Exchange quotations.

W. O. GAFFNEY, sworn.

Direct examination.

By Mr. Davis:

I am manager of the Charleston office of the Western Union Telegraph Company, and was such manager in October, 1918.

Q. I wish you would state whether you know of your own knowledge anything with reference to the handling of these telegrams?

A. Yes, sir.

Q. I will ask you to identify those telegrams and take them and see if you have any personal knowledge as to the handling of them?

A. I find that October the 2nd, there was at 5:03 p. m. a message to S. B. Poston at Johnsonville which was handled by our office.

Q. How does that read?

A. "Can sell 200 bales basis middling \* \* \*" (reading).

Q. That message was handled by your office?

A. Yes, sir.

Q. What time was that received for transmission?

A. 5:03 in the afternoon of October the 2nd.

Q. Go to the next?

Court: Are you going to ask him anything about that message?

39 Q. No, sir, I will ask him about it when I get through.

A. The next is the telegram handled through our office as one from Johnsonville on October the 2nd.

Q. That is the first one?

A. That read "Best offer can get 200 bales cotton \* \* \*," that is evidently the first telegram.

Q. When was that telegram received in your office?

A. 12.23 p. m., October the 2nd.

Q. Now, take the last one—the one from Mr. Poston back on the 3rd.

A. (Reading telegram).

Q. "Which" is the word, "what" in the complaint, and that message was handled in your office?

A. Yes, sir.

Q. When was that message received and delivered?

A. Received at 3.30 on the afternoon of October the 3rd. I was in charge of the office in Charleston on the 2nd and 3rd of October, 1918. Influenza appeared in our office the last days of September. It reached the alarming stage on October the 2nd. Prior to the reported sickness of the delivery supervisor, several messenger boys were reported out and failed to report for duty and we were advised that it was on account of influenza.

Mr. Arrowsmith: Is that not hearsay?

Q. Not hearsay because a general epidemic.

Court: I don't know about general epidemic. He can state that they were not there and that they gave that as their reason.

Q. How many men did you have in that force in your office?

A. We had 26 clerks in the delivery side, and from 20 to 27 or 28 messengers.

Q. How many of that force were out during the general epidemic in Charleston?

Mr. Arrowsmith: We object.

Court: On these particular days.

Q. He said he had this on the 2nd of October.

40 Court: How many absent on October the 2nd?

A. I have no record to show the number.

Court: Did you try to fill their places?

A. Yes, sir. I went so far as to bring my wife and little boy in the office on that day. I placed my fourteen-year-old son at the telephone for the specific purpose of phoning all these cotton quotations to the Cotton Exchange. I was compelled to take out the telegraph system and substitute a telephone system, and Mr. Jervey received the telephone messages and cotton quotations in the cotton office in the absence of his employees.

Q. What with reference to the general delivery of messages, ex



plain how they were delivered to the Cotton Exchange and with reference to the general delivery—could you supply the places of the sick messengers and clerks?

A. No, sir. I personally went on the streets and phoned two or three and asked them to assist me in securing some help and also phoned the employment service manager and asked for special messengers on account of the shortage of the boys. The same conditions prevailed among the operating force of the office. It developed a little later—I mean developed in the clerical department sooner than in the operating department. It developed in the operating department or the delivery department the latter days of September. We were short of operators. I can't say exactly the number, but on or about the 1st of October we were short, I should say, three or four. Conditions continued to grow worse rapidly and we had requests by one of our offices to loan operators and we couldn't do it, because our force showed indications of getting worse. The State quarantine had not been declared. It was declared on October the 5th. Around October the 2nd we were having an average of 200 to 250 new cases a day in Charleston. We were working under very great disadvantages, with an abnormal amount of business.

41 This was due to influenza.

Q. State what it was, in what way?

A. More than half of the business handled was relating to sickness on account of influenza, passing back and forth from and to relatives; also, the Government headquarters were very active in their efforts to master the situation and render assistance, and they were filing telegrams on the subject in great volumes every day and had been for several days.

Q. Were those telegrams, any of them, with reference to procuring medical assistance for various sections?

Mr. Arrowsmith: It seems to me that that is going too far from this proposition.

Court: That is irrelevant—it doesn't make any difference what those messages were about. You can ask him how many messages he handled.

Q. And death messages? The Court is entitled to know and I have every right to ask him how many death and sickness messages he handled. He said he had an abnormal amount of sickness and death messages.

Court: Find out how many he regards as abnormal.

Q. Go ahead—how many?

A. I should say we handled out of Charleston originating and destined to Charleston six to eight hundred messages a day at that time. We handled on an average of 1,800 to 2,000 messages a day. At this time we handled six to eight hundred death messages a day. We do not handle 1,800 death messages a day. The usual volume of death messages a day doesn't average more than fifteen or twenty I should say, so the difference between the two particular dates is the difference between 15 and 20 and 600 or 800—pertaining to sickness and death. That is what I meant when I said I had an abnormal

amount of messages and half of the messages handled were relating to sickness or death. That condition prevailed there from the latter part of September, about the 20th, until the 10th or 15th of November.

42 Q. Do you recall how many of your force or what percentage of them were out on account of it?

Mr. Arrowsmith: I want to find out the dates.

Q. He said the last of September to the 10th of November.

Court: Or the 15th of November.

A. From about the 20th of September until about the 15th or 10th of November.

Q. During that period what percentage of your force actually went out?

A. I don't recall but two cases—two people in the office who didn't have it, myself and one other clerk.

These Government messages related to the Southeastern Department, which comprises the entire Southern States, at least from Virginia to the Mississippi River. The headquarters of the Southeastern Department was located in Charleston. We were handling these sickness and death messages for that department with reference to the army camps of the Southeastern Division. I had to leave my desk entirely and give my entire time over to serving customers at the counter sending these telegrams, and I was not at my desk more than two or three days during the whole time.

Whether a wire from Johnsonville to Charleston would be handled by an operator to be assigned to that line would be controlled by the movement of business. If we had sufficient number of telegrams over it to require an operator on the wire, he would be there. We would assign one person to one wire, but on account of shortage of operators during this period, we were combining several lines and putting them on one operator, that is, one operator would cover more than one wire. That operator would cover more wires than the operator would under normal times.

With reference to the delivery service, when normal we send out messages one and two on a trip, but during this time we would  
43 make up message routes, something in the nature of mail routes and we would send them out anywhere from ten to twenty-five or fifty by one boy to make the best time he could and cover the delivery of telegrams with the least possible delay, and often it was impossible to deliver them promptly. We couldn't get the messengers to distribute them as promptly as we had done before.

Around the first of October, I printed with my own hands and placed a placard over our counter that all telegrams were being accepted subject to delays on account of sickness.

Court: When did you do that?

A. Around the first of October, and it stayed there until the middle of November.

Q. Mr. Gaffney, look at that message and state what is the filing time at Johnsonville?

A. 1:24 p. m., October the 3rd.

Q. What is the receiving time?

A. 3:30 p. m.

Court: What message was that?

A. October the 3rd, the last one.

Q. Please explain to the jury how the delay in handling a message like that could occur during this period of congestion on account of the influenza that you spoke about.

A. It is very probable that between these hours—1:24 and 3:30 p. m., if not taking a good portion of the time, I had the operator that should cover this wire normally on some other wire handling a larger amount of business than this wire.

Q. The same condition that you spoke of there and have one operator covering three or four wires, which the operator wouldn't do in normal times?

A. That's it.

Cross-examination.

By Mr. Arrowsmith:

I undertook the managership of the Charleston office February two years ago. During that time I kept very strict record of the  
44 business of my office; have a regular set of books showing what money I took in and paid out and to whom. It is entirely possible from those books to show what operator was on duty on the 3rd of October and what operators stayed in. Those books are in Charleston. I didn't bring them because I was not instructed to do it.

Q. I don't blame you for that, that's all right. Now, you also had a way of showing to the Court how many messenger boys were off duty?

A. We had.

Q. That you had employed—how many you had off duty?

A. Yes, sir.

Q. And how many got paid for that day?

A. It will show how many we had on, but won't how many off.

Q. Wouldn't it show how many off?

A. The messenger boys are paid by the piece.

Q. Don't have any record showing how many working for you?

A. Yes, sir.

Q. If they do work, that shows it?

A. No, sir, that don't.

Q. You could show the number you had?

A. Yes, sir.

Q. And show whether sufficient to have handled the business?

A. Yes, sir.

Q. Where is that book?

A. Charleston.

Q. For the same reason?

A. Yes, sir. The City of Charleston has a Department of Health, and Dr. Mercer Green is at the head of it. I judge he is the man to whom the reports of influenza were made. I am not connected with that department. As a citizen of Charleston, I know that Dr. Green

is at the head of that department. No effort was made through me to bring Dr. Green here to testify as to the pandemic or epidemic. It was not my duty to do so. I am in charge of the Company's business in Charleston, but not compiling evidence in a case. The other clerk in my office who was not afflicted with influenza was a little telephone operator.

45 Q. Miss Smeak testified this morning that she had likely remained?

A. I said telephone operator. I said clerks.

Q. Clerks don't have anything to do with the transmission or delivery of telegrams.

A. They have all to do with the telegrams. They had to phone practically all.

Q. Why didn't you phone Mr. Ravenel?

A. We delivered the nearby telegrams and phoned the long trips.

Q. Now as a matter of fact, you had the same trouble with your messenger boys all through July that you had in October, didn't you?

A. Oh, we haven't had a full messenger force since the war started.

Q. Since Mason & Hanger started down there?

A. No, sir.

Q. Why did you say your short force was due to the act of God?

A. The prevalence of the epidemic I say. A good many messengers were absent on that account.

Q. As a matter of fact, a great many messengers didn't report for duty at all after Mason & Hanger came there?

A. They left our employ.

Q. And you have been having trouble in delivering your telegrams ever since, and are having it now?

A. Not as bad now.

Q. Mason & Hanger are not employing so many men?

Court: When did the difficulty start in the delivery service?

A. When the Government operations began and had developed around and started construction work.

Q. When was that?

A. A year before that time.

Q. As a matter of fact the scarcity was not due to influenza, but had prevailed a year or more before this time?

A. The scarcity and the conditions were intensified by that. I known in Charleston in the last days of September that conditions were acute in my office. I did not notify any office accepting messages for my office of the conditions there. It was not my business to do that. It was somebody's business connected with the Western Union.

46 Q. And that was not done?

A. Yes, sir. The notice I posted over the counter was in response to a notice sent out by the Superintendent's headquarters.

Q. You would not expect Mr. Poston to take notice of the fact that you had a hand printed thing in your office?

A. If the operator at Johnsonville had posted the same notice I did and stuck it up——

Q. Where is the operator at Johnsonville?

A. I don't know where he is.

Q. You know him, don't you?

A. No, sir, I don't know him. I never saw him.

Q. Do you know how you got this message from Mr. Ravenel?

A. How who got it?

Q. Your office?

A. I imagine the telegram itself would show.

Q. Take the telegram, will you, and look at it?

A. I couldn't tell whether or not brought in by a messenger, but should be able to tell from the record on it.

Q. It is the one marked "rush?" The message from Mr. Ravenel to Mr. Poston?

A. This telegram bears no messenger number or mark, evidently handed in over the counter.

Q. You make that statement——

A. If it was, they put a messenger's number on it when brought in by a messenger, and this has none.

Q. Is it possible that could have been an oversight in this case?

A. I suppose anything is possible, but the boy that made the trip would not have gotten paid unless he had his number.

Q. On this occasion they could overlook a little thing like signing a telegram or putting that on it?

A. That is the case very often as compared with the amount of business we handle.

Q. I am very glad to hear you say that. You have a record  
47 to show how many death and sick messages were handled?

A. No, sir, not now. The messages would not be kept there. We don't keep a separate record showing the death messages. We keep copies of the telegrams themselves, but don't compare them with the daily volume of business handled.

Q. How many of those telegrams did you actually handle, that is, how many hours a day were you there in the office?

A. From eight in the morning until anywhere from seven to ten o'clock at night.

Q. Often there all night?

A. No, sir, we closed at one o'clock.

Q. Why is it with this abnormal amount of business you didn't keep open during the night time?

A. You can't effect delivery of messages with any degree of satisfaction after midnight.

Q. Notwithstanding the unusual and abnormal business?

A. Most of our offices close and incoming messages stop coming except from large points.

Q. This first message was taken at Johnsonville at 12:20, and at 12:23 you had finished receiving it at Charleston, that is a fact?

A. I think that is my recollection.

Q. 12:23, that was on October the 2nd?

A. Yes, sir.

Q. Now, on October the 2nd, the operator working the wire from Johnsonville to Charleston was not affected with influenza?

A. Evidently not.

Q. Now, this message was received in Charleston at 5:03 p. m.— I want to know who handled that message?

A. I can't state as to that.

Q. Why not?

A. That was handled by the Johnsonville office and not Charleston.

Q. This was made in Johnsonville. Haven't you got the message made in Charleston?

A. Yes, sir.

Q. Look at that please, sir, and tell me who sent that?

A. How does that message read?

48 Q. "Can sell 200 bales at 32½ cents."

A. The Charleston operator that handled this message is not here. Her initials are E. V.

Court: Who was that?

A. That was the young lady that is sick and could not be here today.

Q. Where is she?

A. She reported sick yesterday.

Q. She lives in Charleston?

A. Yes, sir.

Q. Do you know whether she had influenza on the 2nd or 3rd of October?

A. I couldn't state from memory.

Q. Couldn't state from memory?

A. No, sir.

Q. You had an opportunity to bring that information and didn't do it?

A. It never occurred to me. I only brought what I was instructed to bring.

Q. I am not suing you, but am suing the Western Union Telegraph?

A. I didn't intend getting hold of any record—

Q. This message received at Charleston 5:03 was not received in Johnsonville until 11:30 the next day, that is a fact, and the lady that sent it didn't have the influenza?

A. I couldn't state as to that.

Q. You have stated already that she didn't have influenza?

A. Not that message.

Q. Did you hear Mr. Poston testify that the agent at Johnsonville did not have any influenza at that time?

A. Yes, sir; I heard him say that.

Q. Why was the delay?

A. The record here shows they had wire trouble.

Q. In addition to that, you had your office terribly disorganized because of the fact you were remodeling the office?

A. We were making repairs in order to handle the large amount of business.

Q. And necessarily that created a considerable amount of confusion?

A. Created some of that. We were making provision for handling the normal amount of business without undue delay.

49 Q. You knew, of course, the hours of the Cotton Exchange?

A. Yes, sir.

Q. And you knew, of course, the fluctuations of the cotton market?

A. I was not interested directly in that.

Q. You knew that the cotton was going up and down at all times, not only at that time, but handled the C & D reports over that wire?

A. I never see the quotation at all.

Q. Somebody in your office sees it?

A. Yes, sir.

Q. And they knew the fluctuations of the cotton market?

A. I suppose they did.

Q. And somebody in your office saw this message with the word "rush" printed on the bottom?

A. That was put on the bottom of the message.

Q. That was an indication to emphasize the importance of it?

A. Yes, sir.

Q. And they saw that, notwithstanding which they kept it in your office from five o'clock to ten the next day?

A. That was on the day that they reported wire trouble.

Mr. Davis: I have the papers of the 2nd, 3rd and 5th of October, showing the influenza condition—three papers published in Charleston, and Mr. Poston says he took the News and Courier and it seems to me that is notice.

Mr. Arrowsmith: Counsel has been objecting to my using the question—

Mr. Davis: You had not all the papers—

Court: Are you offering the papers?

Mr. Davis: Yes, sir.

Mr. Arrowsmith: We object.

Court: That doesn't show the state of health in Charleston.

Mr. Arrowsmith: Let me see what you have from the News and Courier of October the 2nd.

Mr. Davis: I have the Evening Post of the 2nd.

50 Mr. Arrowsmith: I don't care about that. I want to see what you have about October the 2nd.

Mr. Davis: All right (Reading): "Influenza cases must be reported."

Mr. Arrowsmith: I object to that particular item because it doesn't deal with the conditions in Charleston and that is based upon the reports issued by the United States Public Health Service from Washington.

Court: I don't think that is competent.

Mr. Davis: I think the allegation of the answer that the whole of the United States was in the grip of an epidemic or deadly disease—

Court: The whole of it?

Mr. Davis: Yes, sir. I offer it.

Court: I don't think the newspaper is competent.

Mr. Davis: The defendant offers copies of the News and Courier of October the 2nd and 3rd, 1918, the plaintiff having testified that

he took this paper at that time—the object of this testimony being to bring home to Poston the prevalence of the influenza epidemic in the City of Charleston.

Mr. Arrowsmith: We object upon the ground that nothing therein contained has any tendency to show any epidemic condition in Charleston, and on the further ground that the newspaper is not the proper way to show the said condition.

Mr. Davis: The defense closes.

*Reply.*

S. B. POSTON recalled.

Examination by Mr. Arrowsmith:

Q. I want to ask you if you have made a calculation of the number of pounds and how many pounds there were?

51 A. Yes, sir. I made a mistake awhile ago and have recalculated—103,210 pounds.

Q. You said this morning the 200 bales were 40,000 pounds?

A. Yes, sir; that is a mistake in calculation.

Court: How much do you say now?

A. 103,210—a little over 500 pounds average to the bale.

No cross-examination.

W. B. RAVENEL recalled.

Examination by Mr. Arrowsmith:

Q. How did you deliver this message to the Western Union? Was it carried to the office or sent for by a boy?

A. My recollection is that we telephoned for a boy to come for it.

Cross-examination.

By Mr. Davis:

I cannot swear that I did. That is only based on my recollection. That was always our custom—to telephone for a boy. We have a call box in our office and we ring that call box for a boy, and in case he doesn't come, we phone for him. I am basing that on the usual custom. I may not have done that this time—yes, sir, but that is the thing I can't tell you now. It has passed out of my recollection. We have got a call box for the Western Union to ring for a boy, and during that time if any of them come in for a telegram and not have much delay about delivering messages—we have some very nice customers down there, Mr. Davis, and one of the conveniences we have is to have a call box to the Western Union in our office, but sometimes that doesn't work and we use the telephone, but we receive and send messages principally by the boy.

Q. I don't want to be bound by the custom.



52

## EXHIBIT A.

"Received at 145 East Bay St., Charleston, S. C.  
3j MS 11 Collect.

Johnsonville, S. C., 12:20 P. M., Oct. 2, 1918.

W. B. Ravenell and Co. C19  
Charleston, S. C.

Wire best offer you can get two hundred bales cotton.

S. B. POSTON,  
1223 P. M."

(Rec'd 4 p. m.—Mr. Ravenel's notation.)

## EXHIBIT B.

"Received at Johnsonville, S. C.

2CN—23—Charleston, S. C., 503P.

10/2/18.

S. B. Poston, Johnsonville, S. C.

Can sell Two Hundred Bales Thirty Two one half cents basis middling landed Charleston provided all this year's crop subject to prompt reply.

W. B. RAVENEL & CO.  
1130A 10/3"

## EXHIBIT C.

"Received at 145 East Bay St., Charleston, S. C.  
Collect.

3JEV 16

Johnsonville, S. C., 124 P. M., Oct. 3, 1918.  
758

W. B. Ravenel and Co.,  
Charleston, S. C.

Your wire sell Two Hundred Bales which you have, balance being shipped today and tomorrow.

S. B. POSTON,  
330 P.

(Rec'd 4:40 p. m. 10/3/18.)

Our telegram 2nd."

(Mr. Ravenel's notation.)

## EXHIBIT D.

"Charleston, S. C., Oct. 2, 1918.

S. B. Poston,  
Johnsonville, S. C.

Can sell two hundred bales thirty two one half cents basis middling landed Charleston provided all this year's crop. Subject to prompt reply.

W. B. RAVENEL & CO.  
Rush."

Charge W. B. Ravenel & Co.

## EXHIBIT No. 2.

(Possession and Control of Telegraph and Telephone Systems.)

By the President of the United States of America.

*A Proclamation.*

Whereas the Congress of the United States, in the exercise of the constitutional authority vested in them, by joint resolution of the Senate and House of Representatives, bearing date July 16, 1918, resolved:

That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: Provided

54 That just compensation shall be made for such supervision, possession, control, or operation, to be determined by the

President and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid 75 per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by Section 24, Paragraph 20, and Section 145 of the Judicial Code: Provided further, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers or regulations may effect the transmission of government communications, or the issue of stocks and bonds by such system or systems.

And whereas it is deemed necessary for the national security and defense to supervise and to take possession and assume control of all telegraph and telephone systems and to operate the same in such manner as may be needful or desirable:

Now, Therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolution, and by virtue of all other powers thereto me enabling, do hereby take possession and assume control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies.

It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster  
55 General, Albert S. Burleson. Said Postmaster General may perform the duties hereby and hereunder imposed upon him so long and to such extent and in such manner as she shall determine, through the owners, managers, boards of directors, receivers, officers and employees of said telegraph and telephone systems.

Until and except so far as said Postmaster General shall from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers, and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case may be.

Regular dividends hitherto declared, and maturing interest upon bonds, debentures, and other obligations, may be paid in due course; and such regular dividends and interest may continue to be paid until and unless the said Postmaster General shall, from time to time, otherwise by general or special orders determine; and, subject to the approval of said Postmaster General, the various telegraph and telephone systems may determine upon and arrange for the renewal and extension of maturing obligations.

By subsequent order of said Postmaster General supervision, possession, control, or operation, may be relinquished in whole or in part to the owners thereof of any telegraph or telephone system or any part thereof supervision, possession, control, or operation of which *he* is hereby assumed or which may be subsequently assumed in whole or in part hereunder.

From and after 12 o'clock midnight on the 31st day of July, 1918, all telegraph and telephone systems included in this order and  
56 proclamation shall *be* conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done by the President, in the District of Columbia, this 22nd day of July, in the year of our Lord one thousand nine hundred and

eighteen, and of the independence of the United States the one hundred and forty-third.

[SEAL.]

WOODROW WILSON.

By the President:

FRANK L. POLK,

*Acting Secretary of State.*

(No. 1466.)

EXHIBIT No. 3.

Postoffice Department.

Washington, August 1, 1918.

*Order No. 1783.*

Pursuant to the proclamation of the President of the United States I have assumed possession, control and supervision of the telegraph and telephone systems of the United States. This proclamation has already been published and the officers, operators and employees of the various telegraph and telephone companies are acquainted with its terms.

Until further notice the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels. Regular dividends heretofore declared and maturing

57 interest on bonds, debentures and other obligations may be paid in due course and the companies may renew or extend their maturing obligations unless otherwise ordered by the Postmaster General. All officers, operators and employees of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment. Should any officer, operator or employee desire to leave the service he should give notice as heretofore to the proper officer so that there may be no interruption or impairment of the service to the public.

I earnestly request the loyal cooperation of all officers, operators and employees, and the public, in order that the service rendered shall not only be maintained at a high standard but improved wherever possible. It is the purpose to coordinate and unify these services so that they may be operated as a national system with due regard to the interests of the public and the owners of the properties.

No changes will be made until after the most careful consideration of all the facts. When deemed advisable to make changes due announcement will be made.

A. S. BURLESON,

*Postmaster General.*

## EXHIBIT No. 4.

Postoffice Department.

Washington, October 9, 1918.

*Order No. 2114.*

The proposal of the Western Union Telegraph Company, dated October 9, 1918, with respect to just compensation for the use of the properties owned by them during the period of Federal control provided for in the Joint Resolution of Congress approved July 16, 1918, and the proclamation of the President with respect thereto dated July 22, 1918, and the order of the Postmaster General assuming supervision, possession, control and operation of this and other telephone and telegraph companies, dated August 1, 1918, is hereby accepted on behalf of the United States, and compensation will be paid in accordance with the terms and provisions thereof.

(Signed)

A. S. BURLESON,  
*Postmaster General.*

The Western Union Telegraph Company, hereafter referred to as owner, hereby offers to accept a just compensation for the supervision, possession, control and operation of the telegraph system of the owner taken by the President of the United States under a joint resolution of the Senate and House of Representatives, dated July 16, 1918, which supervision, possession, control and operation commenced at twelve (12) o'clock midnight on the 31st day of July, 1918, and is referred to as Federal control, to be fixed as follows:

Section 1. The owner's telegraph system of which the President has taken such supervision, possession, control and operation includes:

(a) All of the telegraph property operated by the owner as parts of its telegraph system, whether owned, leased or controlled, and all additions, including those through consolidations and purchases made thereto during the period of Federal control, being its system of land lines and articulated cables forming a component part thereof within the jurisdiction of the United States.

(b) All materials and supplies on hand at midnight July 31, 1918, pertaining to such landline system. As soon as practicable a separate inventory of said materials and supplies shall be made and authenticated for him by the signature of such persons as the Postmaster General may designate for that purpose, and for the owner by the signature of the president or a vice president of the owner, which inventory when so authenticated shall constitute a part of the proposal.

(c) The net balance as of midnight July 31, 1918, in the accounts shown on the books of the owner and under the uniform system of accounts for landline system telegraph companies prescribed by the Interstate Commerce Commission as follows: (1) number 108, employees' working funds, (2) number 111, due from customers and agents, (3) number 112, accounts receivable from system corporations, (4) number 113, miscellaneous accounts receivable, (5) number 116, other current assets, (6) number 107, special deposits.

(d) Three million (\$3,000,000) dollars in cash for working capital, the use of which the Postmaster General is to have during the period of Federal control without interest, which amount is the amount of working capital which the owner had on hand August 1, 1918, attributable to such landline system.

Section 2. During the period of Federal control, the operation of the property of the owner shall be continued at a standard of efficiency relatively equal to that of the past.

Section 3. (a) During the period of Federal control, through current repairs, maintenance and reconstruction, the property of the owner shall be maintained by the Postmaster General up to a standard relatively equal to that existing on July 31, 1918, so that its state of repair and operating condition will be relatively the same  
60 at the expiration of the period of Federal control as at its beginning.

(b) In order to make the provision for depreciation and obsolescence relatively equal to that of the past, during the period of Federal control the Postmaster General shall set aside in each year (and at the same rate for each fraction of a year) the sum of four million (\$4,000,000.00) dollars and an amount equal to 2½ per centum of the cost of each addition to the property of the owner during the period of Federal control including additions made through consolidations and purchases. It is understood that the owner of the property has at the present a large number of operating contracts in existence with various railroads in the United States which provide generally, that the latter shall perform certain services in connection with repairs and renewals of the telegraph property in exchange for telegraph service rendered, and if for any reason during Federal control such contracts are terminated or amended without the consent of the owner in such a manner as substantially to affect such services rendered by the railroad companies so as to diminish the value of such services rendered to the telegraph company, then the Postmaster General shall correspondingly increase the amount set aside each year for maintenance, depreciation and obsolescence as to reimburse the telegraph company for such diminished service.

(c) The Postmaster General shall further make provision for the amortization of intangible capital, right of way and land and debt discount, including additions to these accounts because of additions as aforesaid to the property during the period of Federal

control upon a basis substantially equal to the established practice of the owner prior to Federal control.

(d) The amounts so set aside shall be credited in monthly  
61 installments in accordance with the present established practice of the owner.

(e) The charges affecting construction, maintenance, depreciation, reserves for accrued depreciation and amortization of landed and intangible capital and for the amortization of debt discount shall during Federal control be made according to the system of accounts prescribed by the commission.

(f) The reserves for amortization of intangible capital, for right of way and land and for the amortization of debt discount, set up as aforesaid together with any balance remaining in the depreciation reserve (set up and created as aforesaid) shall first be expended by the Postmaster General for additions, approved by the owner, to the property as and to the extent needed. If such expenditure does not absorb all said reserves and balance, then the Postmaster General may divert and use such remaining portion for such purpose, in connection with the development of the company's such landline property, as he sees fit and the United States shall thereupon and thereby become obligated to pay an amount equal to the sum so diverted and used, to the owner at the end of the period of Federal control, without interest, subject to the provisions of the last clause of Section 6, Clause (a).

Section 4. The owner shall have the right to inspect its property at all times during the period of Federal control and the Postmaster General shall provide reasonable opportunities for such inspection, but such inspection shall not interfere with the operation of the property.

Section 5. (a) During the period of Federal control, the owner's plan of practice for compensating employees on account of injury, disability and death and likewise its pension plan, shall be continued, except as modified by mutual agreement by the owner and the Postmaster General. The Postmaster General shall pay  
62 all installments or pensions granted prior to August 1, 1918.

(b) The owner shall, before they become delinquent, pay all taxes, license fees and charges, and the expense of suits in respect thereof which can or may lawfully be imposed during the period of Federal control by Federal or other governmental authority upon any part of the property described in Paragraph (a) of Section 1 hereof, and also such other taxes, license fees and charges as during the period of Federal control become the obligations of the owner.

(c) The owner shall render bills to the Postmaster General for such taxes, license fees and charges and operating expenses incident thereto as the same are paid, which bills shall be accompanied by receipts of the proper tax collecting officials, and shall be paid by

the Postmaster General within five days after their rendition, except that said bills shall not include and the Postmaster General shall not pay to the owner, the portion of such taxes, license fees and charges properly apportionable to property not taken under Federal control and to the revenue from said last mentioned property.

(d) If any such tax, license fee or charge is for a period which began before July 31, 1918, or continues beyond the period of Federal control, such portion of such tax, license fee or charge as may be apportionable to the period of Federal control shall be paid by the Postmaster General and the remainder shall be paid by the owner.

Whenever a period for which a tax, license fee or charge is imposed cannot be definitely determined, so much of such charge as is payable in any calendar year shall be treated as imposed for such year.

(e) During the period of Federal control, the Postmaster  
63 General shall pay all rentals for property, guaranteed interest, guaranteed dividends and contract payments for property used in the operation of the property of the owner as per schedule attached.

(f) Said taxes and rentals shall be allocated between the expenses of operation and capital accounts in accordance with the accounting rules prescribed by the commission.

Section 6. (a) For the use of the Postmaster General the owner shall, out of the compensation hereafter mentioned to be paid by the Postmaster General for the use of said property, loan to the United States from time to time upon reasonable notice during the period of Federal control, without interest, the sum of One Million Dollars (\$1,000,000.00) per annum to be used by the Postmaster General in additions and extensions of the owner's property. Such proposed additions and extensions shall be submitted to the owner for approval or disapproval in writing. If approved then such extension or addition upon completion shall be a discharge of the Postmaster General to the amount of the cost thereof to repay to the owner such part of said loan. If such extension or addition is disapproved by the owner then the Postmaster General may if he so desires proceed to make the addition or extension, and at the termination of Federal control, the Interstate Commerce Commission if the parties then disagree shall determine the value to the owner of such added facilities or extensions, and the sum due to or payable by the owner, as the case may be. Such procedure shall also govern any unexpended portion of the depreciation reserve herein provided. The word additions shall include additions made by consolidations and purchases.

The title to all such additions made in accordance with the above arrangements shall immediately vest in the owner.



64 (b) The cost of any additions and extensions made by the Postmaster General outside of the said million dollar fund and the unexpended portion of depreciation reserve, and agreed to by the owner, and the value of any additions and extensions which the owner may have disapproved, but which the Interstate Commerce Commission has decided shall be charged to the owner, the cost of such additions shall be repaid to the Postmaster General by the owner in twenty (20) equal annual installments; payable one at the expiration of one year after Federal control and one at the end of each year thereafter until all are paid, with interest from the date of the end of Federal control at the rate of five (5%) per cent. per annum, payable annually upon all unpaid balances.

(c) The Postmaster General shall render to the owner on the 15th day of each month accurate statements of the cost of all material and labor furnished by him for account of the owner for such construction during the preceding month, which statements shall be based upon and be in accordance with the accounting rules and classifications prescribed for the owner by the commission and in force July 31st, 1918, as from time to time amended.

Section 7. (a) The Postmaster General shall pay to the owner for each year and pro rata for each fractional part of a year during the period of Federal control, an amount equal to the sum of the following items: (1) All interest upon the bonds and obligations of the owner outstanding as of July 31, 1918, as per schedule attached, except bills payable. It is agreed that the Postmaster General shall assume all bills payable made subsequent to July 31, 1918, and shall immediately return the collateral pledged in negotiation of such bills. (2) Seven million nine hundred and eighty-five thousand, seventy dollars and eighty-seven cents (\$7,985,070.87), less an amount equal to the net income of the owner's office at Havana, Cuba.

Any securities or obligations issued or guaranteed by the owner and purchased by and in the hands of trustees, shall be treated as outstanding in the hands of the public.

It is hereby provided, however, that the owner shall not declare and pay to its stockholders any dividends in excess of seven (7%) per cent. annually during the period of Federal control.

(b) The amounts provided for under subdivision (a) hereof shall be paid to the owner in monthly installments on the last day of each calendar month during the period of Federal control except that installments which have accrued prior to the acceptance of this proposal shall be payable at the date of such acceptance; such payments to the owner to fully satisfy and discharge all claims of the owner on account of the amounts so paid.

Section 8. (a) All amounts received by the Postmaster General under Paragraphs (a) and (c) of Section 1 hereof, and all other amounts, whether received from the owner in cash or collected or realized by him from prepayments and current operating assets be-

longing to the owner or arising from telegraph operations prior to midnight of July 31, 1918, shall be credited by him to the owner and the Postmaster General shall, to the extent of the cash so received or realized, pay and charge to the owner all expenses arising out of its telegraph operation prior to August 1, 1918, and unless objected to by the owner, may pay and charge to such owner any of such expenses in excess of the cash so received or realized. Balances of the above accounts shall be struck monthly as of the last day of August, 1918, and as of the last day of each calendar month thereafter, within fifteen days, and the cash balance found on such adjustments to be due either party shall be then payable within five days.

(b) Telegraph operating expenses, rent, contract payment deductions shall be allocated with reference to the time when incurred as between the periods prior and subsequent to midnight of July 31, 1918, and between the period of Federal control and the period subsequent thereto, in each instance in accordance with the present established accrual practices of the owner, telegraph operating revenues and rent revenues shall be allocated as between the periods prior and subsequent to midnight of July 31, 1918, and as between the period of Federal control and the period subsequent thereto, in each instance in accordance with the present established accrual practices of the owner.

(c) Items included in the accounts (1) number 121 prepaid rents, (2) number 122, prepaid taxes, (3) number 123, prepaid insurance, (4) number 124, other prepayments, as prescribed by the commission, shall be allocated as between the periods prior and subsequent to midnight of July 31, 1918, and as between the period of Federal control and subsequent thereto in each instance, in accordance with the present established practices of the owner.

(d) There may be used for additions to the owner's property, approved by the Postmaster General, any of the materials and supplies taken over under Paragraph (b) of Section 1 hereof, or purchased by him and held for use in connection with such property insofar as in his judgment this may be done with due regard to his own requirements. Materials and supplies so furnished shall be charged to the owner at inventory prices in the case of those taken over and at cost in the case of those purchased.

(e) The Postmaster General shall pay, or save the owner harmless from, all expenses incident to or growing out of the possession, operation and use of the property taken over during the period of Federal control. He shall also pay or save the owner harmless from all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon it by reason of any cause of action arising out of Federal control or anything done or omitted in the possession, operation, use or control of its property during the period of Federal control, except judgments or decrees founded on obligations of the owner to the Postmaster General or the United States.

(f) The Postmaster General shall save the owner harmless from any and all liability, loss or expense resulting from or incident to any claim made against it growing out of anything done or omitted during the period of Federal control in connection with or incident to operation or existing contracts relating to operations, and shall do and perform so far as is requisite during the period of Federal control for the protection of the owner all and singular the things, of which he may have notice, necessary and appropriate to prevent, because of Federal control or by reason of anything done or omitted thereunder, the forfeiture or loss by the owner of any of its property, rights, ordinance rights, or franchises, or of its connecting or other contracts involving a facility of operation. The Postmaster General shall also save the owner harmless from any and all claims for breach of covenant heretofore entered into by it or by any predecessor in title or interest in any mortgage or other instrument in respect of insurance against losses by fire.

Nothing in this or in the preceding paragraph shall be construed to be an assumption by the Postmaster General of, or to make him liable on, any obligation of the owner to pay a debt secured by a mortgage.

(g) In carrying out the provisions of this section, the Postmaster General shall not settle any claim by or against the owner against the objection in writing of the president or any other duly authorized officer of the owner. The conduct of all litigation arising out of such disputed claims or out of operation prior to Federal control shall be in charge of the owner's legal force and the expense thereof shall be paid by the owner, but the Postmaster General shall render to the owner all reasonable assistance in the conduct of such litigation. This paragraph shall not apply to any litigation between the owner and the United States.

(h) The owner shall have the right at all reasonable times to inspect the books and accounts kept by the Postmaster General relating to the property of the owner or to the operation thereof, and the Postmaster General shall during the period of Federal control furnish to the owner periodically copies of operating reports after the end of each fiscal year, the statistical data for such year substantially as heretofore compiled.

(i) All payments to be made under this proposal which are not paid within five days after due shall draw interest from the date of their maturity until paid at the rate of five per cent. (5%) per annum.

Section 9. At the end of the period of Federal control all the property described in Paragraph (c) of Section I hereof, and also all additions (including those made by consolidations and purchases) to the property of the owner made during the period of Federal control out of unexpended reserves, out of the proceeds of securities, or otherwise, together with all repairs, renewals, and replacements thereof, shall be returned to the owner in a state of repair and in an

operating condition equivalent to that of the owner's telegraph system of July 31, 1918.

Section 10. (a) Inasmuch as the cables of the owner from  
69 Key West to Havana have been operated in connection with the landlines directly from New York to Havana without relaying the messages and such cables are to all intents and purposes an integral part of the owner's land line system, the owner reserves the right to retain said cables from Key West to Havana and to maintain its office in the City of Havana and to operate the same as heretofore and will also maintain the cables connecting such office with the office at Key West.

(b) The owner operates either through ownership or under lease certain telegraph lines and system in New Foundland, Prince Edward Island and the Maritime Provinces, and also a line to Vancouver. The construction, operation and maintenance of these lines and systems shall continue as heretofore under the direction of the owners, using the supervisory operating staff of the landlines in the United States for that purpose. In the discharge of the duties of construction, operation and maintenance such supervisory employees however, shall be considered as employees of the owner, and the same shall be paid by the Postmaster General for the owner's account. Separate account of such operations shall be kept and settled at the end of each month. In settling such accounts the expenses and actual disbursements chargeable to the owner shall be those actually incurred by the Postmaster General on behalf of the owner, and the revenues and interchange of business shall be determined in conformity with the provision of the contract for the interchange of business between the Western Union Telegraph Company and the Canadian Northern Telegraph Company and the Great North Western Telegraph Company dated January 1, 1915, and such provision of said contract are here referred to and made part of this agreement as if attached hereto. The foregoing arrangement to continue so long as the owner continues obligated to operate the said tele-  
70 graph lines and systems as above described. It is understood that any or all of these lines and systems may at the option of the owner be disposed of or become a part of the Great North Western Telegraph system, and in either event shall be subject to the existing contract now in force between the company and the owner.

(c) The owner owns a substantial share in and operates a company known as the American District Telegraph Company of New Jersey, and its controlled companies, doing a general fire alarm burglar alarm and sprinkler supervisory business throughout the United States. The owner proposes that the present relationship between the landline offices and the American District Telegraph Company shall continue during the period of Federal control. Under existing contracts the American District Telegraph Company of New York and the American District Telegraph Company of New Jersey and controlled companies operate a joint messenger service for the collection and delivery of telegrams and cablegrams. It

proposed by the owner to purchase one or both of the plants and thus do away with existing contract obligations. The owner proposes to furnish the money necessary for acquiring one or both of said plants and the Postmaster General shall pay interest upon such sum or sums at the rate of six per centum (6%) per annum until the expiration of Federal control. Before concluding any contract for the purchase of the plant of the American District of New Jersey the owner shall procure the consent of the Postmaster General.

(d) The owner operates under lease a system of Trans-Atlantic cables under separate accounts, part of which system has been for over forty years operated in conjunction and con-jointly with the landline system now taken over by the Postmaster General. In order that the owner shall not suffer loss through the taking over  
71 of the landline system the Postmaster General agrees that the owner shall have the right to maintain and operate independently cable offices for receiving and delivering such cable messages in any cities wherever the owner desires to do so. All cable messages collected or delivered from such offices shall be free of any charge by the Postmaster General, and the expense of operating such offices and delivering such messages to be borne solely by the owner. The Postmaster General furthermore agrees to respect all vias attached to outgoing or incoming messages in accordance with the Berne convention. Cable messages filed at landline offices, and not routed by the sender, to be divided between the Western Union cable system, and the Commercial Cable system, upon an equitable basis as the Postmaster General may direct, the compensation to the Postmaster General for the transmission and accounting of such messages shall be in accordance with the zone rates prevailing prior to July 31, 1918. The same compensation shall attach to messages delivered to landlines at the cable termini, to wit: New York or Boston, for transmission and delivery to destination. The Postmaster General agrees to maintain all cable connections and wire facilities incident to handling cable messages as heretofore, the division of revenues and expenses as between cable lines and landlines to be as heretofore.

Section 11. At the end of the period of Federal control the Postmaster General shall return to the owner an equal quantity and quality of materials and supplies of equal relative usefulness to that of the materials and supplies which he received, and to the extent that the Postmaster General does not return such materials and supplies he shall account to the owner for the same at prices prevailing at the end of the period of Federal control. To the  
72 extent that the owner may then receive materials and supplies in excess of those delivered by it to the Postmaster General, it shall account for the same at the prices prevailing at the end of the period of Federal control, and the balance shall be adjusted in cash.

Section 12. (a) At the end of the period of Federal control there shall be paid to the owner an amount of money equal to the cash working capital without interest received by the Postmaster General

from the owner, and also an amount equal to any other cash and special deposits received by him from the owner at the beginning of the period of Federal control and not theretofore accounted for by him, together with any unpaid interest which may have accrued upon the said other cash and deposits under this proposal. There shall be paid to the owner any funds created under the provisions of this agreement, except to the extent that such funds may have been properly used under this proposal.

Section 13. In addition to the items of compensation enumerated in Section 7, the Postmaster General will pay to the owner the annual charge for such interest and dividends as the owner may be required to pay on new securities, obligations or share capital issued for the discharge, conversion or renewal of present obligations, and for additional interest and charges to secure extension of existing securities or obligations.

Section 14. The owner has a new building in the City of Chicago in process of construction. The owner undertakes to complete this building and upon completion to turn it over to the Postmaster General for occupancy and use. The Postmaster General thereupon agrees to vacate the present building in Chicago and thereafter to have no claim to possession or use of such building and to accept the new building in full substitution therefor, without any modification of this proposal in any other particular.

73 Section 15. In presenting this proposal it is understood that only the salient features incident to the relations of the parties have been described and that further details not covered arising from the operation of the property by the Postmaster General shall be settled in conformity with the broad principles herein enunciated.

Section 16. (a) In this proposal the words "Postmaster General" are used to designate Albert S. Burleson, or such other person as the President may from time to time appoint to exercise the powers conferred on him by law with reference to Federal control; the word "Commission" is used to designate the Interstate Commerce Commission; the word "additions" as used herein shall be understood to mean additions, betterments or replacements as defined by the commission's system of accounts (including extensions and improvements made through consolidations and purchases), the net cost of which, under such system of accounts, is properly chargeable to fixed capital, that is to say, accounts:

No. 100. Fixed capital installed prior to January 1, 1914.

No. 101. Fixed capital installed since December 31, 1913.

No. 102. Construction work in progress.

(b) Whenever reference is made herein to the system of accounts of the commission, it shall be understood to mean the uniform system of accounts and rules for telegraph companies prescribed by the commission as such system existed at midnight July 31, 1918.

(c) Any patents or licenses thereof discoveries, inventions, ideas or devices owned or controlled by the owner may be used by the Postmaster General without charge by the owner during the period of Federal control, but the right to such use shall not extend beyond said period. Nor shall the use of patented devices owned by other individuals or companies, be construed to confer any right upon the owner herein to use or to control the use of such devices subsequent to the termination of Federal control; nor shall the use during the period of Federal control of patented devices covered by patents of the owner on property other than that of the owner be construed to confer the right to continue such use after the termination of such period.

(d) This proposal, if accepted by the Postmaster General, shall be effective on and from midnight July 31, 1918.

Dated this 9th day of October, 1918.

(Signed) THE WESTERN UNION TELEGRAPH  
COMPANY.

By NEWCOMB CARLTON,

*President.*

Washington, D. C., October 9, 1918.

Hon. A. S. Burleson, Postmaster General, Washington, D. C.

DEAR SIR:

The term "net income" as employed in Section 7, Paragraph (a) of proposal submitted herewith is intended to include all earnings of the Havana office less fixed charges and expenses, of its operation and maintenance and the fixed charges and expense of the maintenance and operation of its cables and connecting lines between the Havana office and Key West office. It is also intended that standard rates of charge for cable ship when required and cable materials shall be charged in said accounts.

Respectfully yours,

(Signed)

NEWCOMB CARLTON,

*President.*

O. K.

(Signed)

J. C. KOONS,

*Acting P. M. G.*

October 9, 1918.

The foregoing constitutes all of the evidence in the case.

*Motion for a Directed Verdict.*

Mr. Davis: We move for a directed verdict in favor of the defendant on the following grounds:

1. In that at the times that the messages involved in this suit were filed for transmission and delivery and the cause of action accrued,



the defendant was not engaged in the business of operating its telegraph system, but that said system was, and still is, being operated solely by the Government of the United States under the direction of the Postmaster General of the United States, and to permit this suit to be maintained against this defendant would deprive it of its property without due process of law and would deny to it the equal protection of the laws in violation of the fifth and fourteenth amendments to the Federal Constitution.

2. In that at the times that the messages involved in this suit were filed for transmission and delivery and the cause of action accrued, the defendant was not engaged in the business of operating its telegraph system but that said system was, and still is, being operated solely by the Government of the United States under the direction of the Postmaster General of the United States, pursuant to the joint resolution of the Congress of the United States, and that to hold the defendant liable for damages in this case would be in violation of and in contravention to the provisions of Article I, Section 8, Subdivision 12 of the Constitution of the United States, empowering Congress to raise and support armies, of Article I, Section 8, Subdivision 7 of the Constitution of the United States, empowering Congress to establish post offices and post roads, and of Article I, Section 8, Subdivision 18 of the Constitution of the United States, empowering Congress "to make all laws which shall be necessary and  
76 proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof," and in violation of and in contravention to the Acts and Joint Resolution of the Congress of the United States passed pursuant to the foregoing powers and especially the aforesaid Joint Resolution of July 16, 1918.

3. In that the delay in transmitting and delivering the telegrams involved in the suit, if there was any delay, was due not to any negligence on the part of the defendant, but entirely to an act of God, to-wit, the prevalence of an epidemic of a deadly disease.

4. In that there is no evidence in the case of any negligence on the part of the defendant as the proximate cause of the injury to the plaintiff.

5. In that the entire evidence shows that the injuries sustained by the plaintiff, if he sustained any at all, was due solely to the act of his cotton factor in Charleston, South Carolina.

The Court: I think the Government has taken possession of the operation, but have done it as agents of these companies, and undertaken to indemnify all these companies on all claims arising out of causes of action which might arise to anybody from the operation of the company during the period of its operation through the Government agency, so that it does not affect the ultimate liability of the Telegraph Company as operating under the charter from the State of South Carolina, but is a common carrier and is bound to



the obligation of a common carrier and cannot divest itself of those obligations; at the same time, it goes on and exercises the powers of its charter and getting the income, and therefore it has to bear its burden. I will have to overrule the motion and let it go to the jury.

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*Charge.*

Mr. Foreman and Gentlemen of the Jury:

This is an action brought by the plaintiff, S. B. Poston, against the Western Union Telegraph Company, in which the plaintiff seeks to recover certain damages which he claims he has sustained by reason of the negligence of the defendant telegraph company in handling and delaying the delivery of certain telegrams mentioned in the complaint, which he says he sent over the lines of the defendant company from Poston, S. C., to Charleston, S. C., and telegrams which were sent to him from Charleston, S. C., to Poston, S. C.

The defendant comes into court and admits that it does own a telegraph line—did I say Poston? It is Johnsonville, instead of between Poston and Charleston it is Johnsonville and Charleston, S. C.; somehow I got the name Poston associated with the plaintiff's firm. I don't know who they were, but that was the name of the plaintiff.

The defendant admits that it owns this telegraph line, but it says—and that it was engaged in doing the business of a common carrier of intelligence for hire between the two points mentioned in the complaint; and it admits that the telegram or telegrams similar to those mentioned in the complaint were delivered to it for transportation, and were transported over its wires; but it sets up as a defense that it was not at that time operating this line of telegraph wires, but that the wires and telegraph plant was being operated by the government agents under the direction of the Postmaster General, and for that reason the defendant asks that the complaint be dismissed.

Under the view that I take of the law, the mere operation of a telegraph line belonging to the defendant by the governmental agents under the direction of the Postmaster General would not relieve the defendant as a common carrier of intelligence for hire for the failure to discharge its duty as such common carrier with respect to messages delivered to it for transmission over its line, and therefore, you are to consider this case just as though the agent operating the telegraph lines of the defendant company was agent of the defendant company.

Now the telegraph company is a common carrier of intelligence for hire and owes to the public the duty to use diligence in the transmission and delivery of messages, and where a person is injured by the failure of the telegraph company to perform its duty with reference to messages which he has delivered to the telegraph company to transmit over its lines or which are sent to him for his benefit over the line of the defendant company, and this failure of the telegraph company to perform its duty was due to negligence on

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its part, then in such case the telegraph company would be responsible to the person injured for the resulting damages. The law imposes upon the telegraph company the duty to receive and transmit messages with promptness and reasonable diligence, and in determining whether or not they were negligent in failing to perform their duty, you are to be governed by what would be required of them in the exercise of ordinary care.

The action is based on negligence, and negligence is the failure to exercise and use ordinary care that would be used by an ordinary person—or a person of ordinary prudence under the circumstances of the occasion.

Now if the telegraph company is negligent in the performance of its duty, and a person is injured as a proximate result of such negligence, the person injured would be entitled to recover the actual damages thereby occasioned to him, and the rule of damages is stated as follows: Now I am not reading exactly, but I will change it as I

79 go along: A telegraph company is liable for damages that are the natural and proximate results of its negligence to successfully deliver a message received by it for transmission and delivery. Damages are a natural result when they are such as

usually follow in the ordinary course of things, and they are the proximate result when they result directly or remotely from the alleged cause. Such damages are recoverable because they are supposed to be within the contemplation of the parties when they contract. If a telegram making an offer of a price is sent, and the sale is to be made by an acceptance of that offer promptly, and if the message is sent over a telegraph line by the telegraph company to accept the offer and thereby make a sale by a meeting of the minds of the two parties, a proposed contract of sale, and through the negligence of the telegraph company, the message of acceptance is delayed—is negligently delayed beyond a reasonable time and delivered after the time limited for its acceptance by the party making the offer, and the party who accepted the offer to sell by sending the telegram has been damaged by reason of failing to get the telegram to the party making the offer in time to complete the sale, then the measure of his damages—the measure of the damages of the person who was hereby prevented from disposing of his goods would be the difference between the price at which he could have disposed of his goods under such offer, if he could have disposed of them under the offer, and the market price of the same goods at the time the message was actually delivered or should have been delivered, and he has the opportunity to dispose of them. And the market value is what price he could have obtained in open market on fair competition and where parties are dealing with reference to market prices in a particular point, reference must be had to the market price of that particular point, and if there is no market price at that particular place, then at any other convenient market for the goods which the party has

80 for sale where there was at the time a market price, and when transportation and other expenses would be necessarily incurred in getting the goods to a convenient market where there was no market at the place where the goods were had for sale, then those

expenses which are shown to have been actually necessary to put the goods on the market could be taken into consideration in determining what was the actual damage. If there was no market price at the time that the telegram was delivered and it got there too late to close the contract which it was intended to close, then the party sending the telegram and having the goods for sale should act expeditiously in disposing of the goods as soon as he could reasonably do so. He could not hold them to speculate upon a change of value on the market or on advance in price, but he must act promptly—with reasonable promptness to dispose of the goods, and if he does not do that, then the jury in estimating his damages, must take the market value of the goods at such time as he could under the circumstances of the case have disposed of them. He is not allowed to hold the goods in order to speculate upon changes in the market, but he must act promptly as soon as he finds that his proposed sale for which he had a contract price can't be carried out—as soon as he ascertains that he must act promptly to remedy the situation by putting the goods on the market and get what is the actual market price of the goods at that time. That does not mean necessarily the same day on which the telegram was sent, but it may or may not according to the circumstances surrounding him and the opportunities which he has for making a sale, but does—if he does not make a sale and keeps the goods, then it would be for the jury to say when he could have disposed of them, acting with reasonable promptness, and what price he would have realized upon the market; and

81 when the jury ascertains that reasonable market value or the price at which he could have disposed of the goods on the market, acting promptly, as soon as he knows that the proposed contract sale has been defeated, they will compare that market value with the proposed contract price, and if the market value at which he could have disposed of the goods was less than the proposed contract price at which he could have disposed of the goods, then the measure of his damages would be the difference between the two.

Now the telegraph company owes a duty to a sender of a message delivered to it for transportation to inform the sender promptly of any inability on its part to promptly transmit and deliver the message, if it knows of such inability or has notice of it. When it accepts a message for transmission, if it knows of some circumstances which would prevent the prompt handling of the telegram in the ordinary course of business, then it becomes the duty of the telegraph company to give notice to the sender of such circumstances. If the delivery of a telegram is prevented by the act of God, over which the telegraph company has no control—that is the act of God, and such is the sole cause of the delay or non-delivery of the telegram, and the party sending the telegram or to whom the telegram is sent is injured solely by such act of God or overpowering necessity, and the telegraph company has acted with due care in regard to the matter and has been guilty of no negligence, then the telegraph company would not be responsible for the injury to the party sending the telegram or to whom a telegram was sent.

But if there was an unreasonable delay in the transmission or de-

livery of the telegram, or a failure to deliver the telegram, and such delay or failure to deliver was due to negligence on the part  
82 of the telegraph company, then the mere fact that there may have been also present some outside necessity which—or act of God which contributed as one of the causes towards the delay or non-delivery, would not relieve the telegraph company of the liability. But in order to hold the telegraph company liable it must be shown that they were negligent in failing to discharge its duty to promptly transmit and deliver the messages in question, and the burden is upon the plaintiff, the sender of the message, to show negligence on the part of the telegraph company. The mere fact that there was a delay or non-delivery is not sufficient to establish liability, but before liability on the part of the telegraph company can be established, the party injured must go further and show that the injury was due to negligence on the part of the telegraph company.

Now the burden is upon the plaintiff to prove negligence and also to prove that he was injured and the extent of his injury by the preponderance of the evidence, that is the greater weight of the evidence; not necessarily the greater number of witnesses, but by the evidence which carries the greater weight of conviction to your minds. If after hearing all the testimony and considering it, your minds are equally balanced as to whether or not the telegraph company was negligent, or whether or not the plaintiff was injured, why it would be your duty to find against the plaintiff, and in order to find against the defendant—in order for you to find against the defendant, the greater weight of the evidence must be against it. The burden is upon the plaintiff to establish his case by the greater weight of the testimony.

Now if you find that there was negligence on the part of the defendant telegraph company, or its agents or servants, in handling any of the messages mentioned in the complaint, if such mes-  
83 sages had been delivered to it for transmission, and that the plaintiff has been injured thereby, then it would be your duty to determine from the evidence how much he has been injured, applying the measure of damages that I have given to you, that is the difference between such contract price as may have been shown in the evidence—if there was any evidence showing a contract price or an agreed price—and the market value of the goods as soon thereafter as he could dispose of them and sell them on the market; so that all those are questions of fact for you to settle, and if you find that the plaintiff has established a case of liability and shown the amount of his damages, then you would indicate that by writing your verdict "We find for the plaintiff—so many—dollars damages," whatever you find his actual damages to be. If on the other hand you find he has failed to make out a case against the telegraph company in any of the particulars that I have charged you necessary to establish liability on their part, then simply say "We find for the defendant," so take the record. I will hand you the complaint and answer.

The jury returned a verdict in favor of the plaintiff, whereupon the defendant noted a motion for a new trial on the same grounds as those

urged in its motion for a directed verdict. This motion was overruled by the presiding judge.

### *Exceptions.*

1. His Honor erred, it is respectfully submitted, in holding that whether at the time alleged in the complaint the Western Union Telegraph Company maintained an office at Johnsonville, S. C., was a question of fact and in permitting the plaintiff, over the objection of the defendant, to testify that the defendant did maintain such an office at Johnsonville on October 2, 1918, and that he delivered to it in such office the telegram introduced in evidence as Exhibit "A," the error being that whether or not the defendant maintained an office at the place and at the time in question was a question of law to be determined under the joint resolution of Congress of July 16, 1918, and the Proclamation of the President of July 22, 1918, and such question of law could not be left to the determination of a jury.

2. His Honor erred, it is respectfully submitted, in refusing to grant defendant's motion for a nonsuit made at the close of the plaintiff's case, for the reason stated in the grounds of said motion, which was as follows: The defendant moves for a nonsuit on the ground that no damage has been proven, the plaintiff's own witness having said that he made no effort to sell the cotton.

3. His Honor erred, it is respectfully submitted, in refusing to allow the defendant to offer in evidence copies of the Charleston News and Courier of October 2nd and 3rd, 1918, for the purpose of bringing home to the plaintiff knowledge of the prevalence of the epidemic of influenza in Charleston at that time, the error being that the plaintiff had testified that he was a subscriber to and a constant reader of such newspaper at that time, and it is submitted that under these conditions the evidence offered was both relevant and competent and the defendant was entitled to have it placed before the jury.

4. His Honor erred, it is respectfully submitted, in refusing to grant defendant's motion for a directed verdict made at the close of the entire case, for the reasons stated in the grounds of said motion, which were as follows:

First. In that at the times that the messages involved in this suit were filed for transmission and delivery and the cause of action accrued, the defendant was not engaged in the business of operating its telegraph system, but that said system was, and still is, being operated solely by the Government of the United States under the direction of the Postmaster General of the United States, and to permit this suit to be maintained against this defendant would deprive it of its property without due process of law and would deny to it the equal protection of the laws in violation of the fifth and fourteenth amendments to the Federal Constitution.

Second: In that at the times that the messages involved in this suit were filed for transmission and delivery and the cause of action accrued, the defendant was not engaged in the business of operating its telegraph system but that said system was, and still is, being operated solely by the Government of the United States under the direction of the Postmaster General of the United States, pursuant to the joint resolution of the Congress of the United States, and that to hold the defendant liable for damages in this case would be in violation of and in contravention to the provisions of Article I, Section 8, Subdivision 12 of the Constitution of the United States, empowering Congress to raise and support armies, of Article I, Section 8, Subdivision 7 of the Constitution of the United States, empowering Congress to establish postoffices and post roads, and of Article I, Section 8, Subdivision 18 of the Constitution of the United States, empowering Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing power and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof," and in violation of and in contravention to the Acts and Joint Resolutions of the Congress of the United States passed pursuant to the foregoing powers and especially the aforesaid joint resolution of July 16, 1918.

Third. In that the delay in transmitting and delivering the telegrams involved in the suit, if there was any delay, was due not to any negligence on the part of the defendant, but entirely to an act of God, to-wit, the prevalence of an epidemic of a deadly disease.

Fourth. In that there is no evidence in the case of any negligence on the part of the defendant as the proximate cause of the injury to the plaintiff.

Fifth. In that the entire evidence shows that the injuries sustained by the plaintiff, if he sustained any at all, was due solely to the act of his cotton factor in Charleston, South Carolina.

5. His Honor erred, it is respectfully submitted, in charging the jury as follows:

"Under the view that I take the law, the mere operation of a telegraph line belonging to the defendant by the governmental agent under the direction of the Postmaster General would not relieve the defendant as a common carrier of intelligence for hire for the failure to discharge its duty as such common carrier with respect to messages delivered to it for transmission over its line, and therefore, you are to consider this case just as though the agent operating the telegraph lines of the defendant company were agents of the defendant company.

The charge so given was erroneous and prejudicial for the reason that at the time this cause of action accrued, complete possession, exclusive control, and the right to all the revenues derived from the operation of the business, of all the lines and properties of the defendant Western Union Telegraph Company were in the Govern-

ment of the United States as a result of the acts and joint resolution of Congress, the proclamation of the President, and the contract between the government and the company, and the government was in no sense operating the lines and properties as the agent of the company, but solely under and by virtue of its powers of  
 87 sovereignty, and to hold the defendant liable for such operation would deprive it of its property without due process of law and deny to it the equal protection of the laws in violation of the provisions of the fifth and fourteenth amendments to the Constitution of the United States.

To Messrs. Arrowsmith, Muldrow, Bridges and Hicks, attorneys for respondent:

Please take notice that appellant proposes the foregoing as the Case and Exceptions for appeal to the Supreme Court.

WILLCOX & WILLCOX,

*Attorneys for Appellant.*

We hereby agree that the foregoing shall constitute the Case and Exceptions for appeal to the Supreme Court in this case and that a printed copy thereof shall be filed as the return wherever the same may be required by law to be filed.

WILLCOX & WILLCOX,

*Attorneys for Appellant.*

ARROWSMITH, MULDROW, BRIDGES &  
 HICKS,

*Attorneys for Respondent.*

87½ THE STATE OF SOUTH CAROLINA:

In the Supreme Court,

S. B. POSTON, Plaintiff-Respondent,

against

WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant.

*Opinion:*

EUGENE B. GARY, *C. J.*:

The following statement appears in the record:

"This action was commenced in the Court of Common Pleas for Williamsburg County, S. C., on the 17th of November, 1918, by the service of the usual summons and complaint.

"The purpose of the action was to recover damages alleged to have been sustained by the Plaintiff on account of the loss of a sale of two hundred bales of cotton, which loss he alleges was due to delay in delivering certain telegrams, mentioned in the complaint.

The answer alleged for a first defense, in substance, a general denial and a specific denial, that the defendant was operating a telegraph line at the time the cause of action accrued; for a second de-



fense, that under the joint resolution of Congress, the proclamation of the President and the orders of the Postmaster General, the defendant's telegraph line had been taken over by the United States Government, and at the time the cause of action accrued, was being operated exclusively by the Government; and for a third defense, that there was no negligence in the transmission and delivery of the messages, but that the delay, if there was any, was due solely to the prevalence of an epidemic of influenza, which was an act of God.

"The case came on for trial before Judge W. H. Townsend, and a jury at the spring term, 1919, of the Court of Common Pleas for Williamsburg County and resulted in a verdict in favor of the plaintiff for \$1,548.15. Judgment was duly entered on this verdict, and within the required time appellant served notice of its intention to appeal to this court."

The defendant appealed upon exceptions, which it will not be necessary to discuss in detail.

The first question that will be considered is whether there was error in the ruling of his Honor the presiding Judge that the action was properly brought against the defendant, Western Union Telegraph Company.

The appellant's attorneys rely upon the joint resolution of Congress, which was adopted on the 16th of July, 1918; the proclamation of President Wilson on the 22nd of July, 1918; the order made by Postmaster General Burleson, on the 1st of August, 1918; and on the contract between the Western Union Telegraph Company and the Postmaster General, dated the 9th of October, 1918, which were introduced in evidence by the defendant.

The joint resolution of Congress, authorized and empowered the President of the United States to take possession and control of all telegraph systems; and to operate them in such manner as to him might seem needful or desirable. Provided, That just compensation should be made for such supervision, possession, control or operation, to be determined by the President.

In the President's proclamation, he made the following order:

"It is hereby directed that the supervision, possession, control and operation of such telegraph and telephone systems hereby by me undertaken, shall be exercised by and through the Postmaster General Albert S. Burleson, said Postmaster General may perform the duties hereby and hereunder imposed upon him so long and to such extent and in such manner as he shall determine, through the owners, managers, boards of directors, receivers, officers and employees of said telegraph and telephone systems. Until and except so far as said Postmaster General shall, from time to time, by general or special orders, otherwise provide, the owners, managers, boards of directors, receivers, officers and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the name of their respective companies, associations, organizations, owners or managers as the case may be."

The following provisions are in the order, made by the Postmaster General:



"Pursuant to the proclamation of the President of the United States, I have assumed possession, control and supervision of the telegraph and telephone systems of the United States.

Until further notice, the telegraph and telephone companies shall continue operation in the ordinary course of business, through regular channels. All officers, operators and employees of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment."

The following provision is in the contract between the Western Union Telegraph Company and the Postmaster General: "The Postmaster General shall pay, or save the owner harmless from all expenses incident to, or growing out of the possession, operation and use of the property taken over during the period of Federal control. He shall also pay, or save the owner harmless from all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon it, by reason of any cause of action arising out of Federal control, or anything done or omitted in the possession, operation, use or control of its property, during the period of Federal control, except judgments or decrees founded on obligations of the owner to the Postmaster General of the United States."

90 While the action and the judgment therein recovered are in form against the Western Union Telegraph Company, yet in effect they are against the Postmaster General.

The plaintiff followed the mode of procedure directed by the President in his proclamation and ordered by the Postmaster General, not only in his order hereinbefore mentioned but also when he ratified the contract between the Western Union Telegraph Company and himself, which contemplated a judgment in form against the defendant Western Union Telegraph Company.

As judgments recovered in actions, in form, against the telegraph companies are to be paid by the Postmaster General, it can not be successfully contended that the recovery in this case will deprive the defendant of its property, without due process of law.

We proceed to the consideration of the defense "that there was no negligence in the transmission and delivery of the messages, but that the delay, if there was any, was due solely to the prevalence of an epidemic of influenza, which was an act of God."

The testimony upon this question was contradictory, and therefore was properly submitted to the jury.

The facts of the present case are quite different from those in *Castle vs. Ry.*, 99 S. E. R. 846.

Affirmed

We concur.

D. E. HYDRICK, A. J.  
R. C. WATTS, A. J.  
T. B. FRASER, A. J.  
GEO. W. GAGE, A. J.

Filed January 26, 1920.

HARRY McCRAW,

Clerk.

## 91 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, October Term, 1919.

S. B. POSTON, Respondent,

VERSUS

WESTERN UNION TELEGRAPH COMPANY, Appellant.

Appeal from Williamsburg County.

Hon. W. H. Townsend, Judge.

*Petition for Rehearing.*

To the Honorable the Justices of the Supreme Court of the State of South Carolina:

Your petitioner, Western Union Telegraph Company, appellant in this case, by its attorneys, respectfully shows:

1. That on January 27, 1920, a final decision was filed by this Court in said cause, affirming the judgment of the lower court and thereby fixing liability on your petitioner. In reaching this conclusion, your petitioner, by its attorneys, suggests that this court has overlooked certain material matters of law and of fact bearing on the question of liability in the case and which, if applied to the facts of the case, would result in a reversal of the judgment below and a dismissal of the complaint.

The reasons given by the Court for holding your petitioner liable in this case are stated thus:

92 "While the action and the judgment therein recovered are in form against the Western Union Telegraph Company yet in effect they are against the Postmaster General.

"The plaintiff followed the mode of procedure directed by the President in his proclamation and ordered by the Postmaster General, not only in his order hereinbefore mentioned, but also when he ratified the contract between the Western Union Telegraph Company and himself, which contemplated a judgment in form against the defendant, Western Union Telegraph Company.

"As judgments recovered in actions, in form, against the telegraph companies are to be paid by the Postmaster General, it cannot be successfully contended that the recovery in this case will deprive the defendant of its property, without due process of law."

Since at the time the cause of action set forth in the complaint is alleged to have accrued, the lines of your petitioner were being operated solely by the Federal Government under a joint resolution of the Congress of the United States, having the force and effect of a Federal statute, manifestly all questions of liability in this case must be determined by principles of Federal, rather than of State law. In the conclusions above set forth as the grounds for fixing

liability on the defendant for the acts of the Federal Government, this Court, it is respectfully submitted, has wholly overlooked the principles of Federal law that control the case.

The first ground assigned is that "while the action and the judgment therein recovered are in form against the Western Union Telegraph Company, yet in effect they are against the Postmaster General." If it be conceded that this is a correct statement of the actual situation existing in the case, it would seem clear that under the law as declared by the Supreme Court of the United States in numerous decisions, such a judgment could not be rendered. This

statement is a statement to the effect that the Postmaster General, who is an official of the United States Government, is the real party in interest and therefore that the judgment is really against him and not against the company, but there can be no judgment rendered that is to be effective against an officer of the United States in any state court unless there is a direct act of Congress authorizing the recovery of such judgment in a state court. This principle has been so often stated and applied by the Federal decisions as to have become almost an axiom of those courts.

*Ex parte Ayers*, 123 U. S. 443, 31 L. Ed. 216.

*International Postal Supply Co. vs. Bruce*, 194 U. S. 601, 48 L. Ed. 1134.

*Belknap vs. Schild*, 161 U. S. 10, 40 L. Ed. 599.

*Minnesota vs. Hitchcock*, 185 U. S. 373, 46 L. Ed. 954.

*Kansas vs. United States*, 204 U. S. 331, 51 L. Ed. 510.

There is nothing whatever in the record of this case nor is there a fact outside of the case to show that the Congress of the United States has ever consented that the Postmaster General shall be sued, either directly or indirectly, in any state court, and as said by the Supreme Court of the United States in *International Postal Supply Co. vs. Bruce*, 194 U. S. 601, 48 L. Ed. 1134, in the absence of a statute, a court has no more authority to maintain an indirect action against the Federal Government or an official thereof than to maintain a direct action. The statute by which the Government took over the railroads authorizes suits and by subsequent general orders, provisions were made as to maintaining these suits against the Director General. No such provision, however, was made as to the telegraph companies and therefore the only right of action against such companies, as they are exclusively in the hands of the United States Government, is that provided by Section 24, Subdivision 20, of the Judicial Code of the United States.

If these principles are applied to the present case, the Court must hold on the above statement of facts as to the force and effect of the judgment that the judgment is a nullity and that the plaintiff is remitted for his rights to the District Court of the United States for the Eastern District of South Carolina or to the Court of Claims at Washington.

2. The Court, in the course of its opinion, further states as a reason for holding the defendant liable in this case that the plaintiff followed the mode of procedure directed by the President in his

proclamation and ordered by the Postmaster General not only in his order but when he ratified the contract. In making this finding, your petitioner deferentially submits, the Court has inadvertently fallen into an error, as there is nothing in the record to sustain such a conclusion. Neither the proclamation of the President nor the order of the Postmaster General has anything whatever to do with the maintenance of a suit and there is nothing therein that contemplates the bringing of a suit. It is true, the contract states that the Postmaster General shall pay or hold the company harmless from all judgments that may be recovered against it, but this is no authority whatever for allowing the recovery of such indirect judgment against the Postmaster General himself in a state court. If the contract could be given such effect, it would have been a wholly ultra vires act on the part of the Postmaster General, as he was without any authority to confer jurisdiction of an action against him on a state court when no act of Congress furnished the authority for his so doing. In other words, jurisdiction of an action against an official of the United States Government must be conferred by an act of Congress and cannot be conferred by the act of an official of the Government.

3. In the trial of the cause in the court below, your petitioner made a motion for a directed verdict in its favor on the ground, among others, that "at the times that the messages involved in this  
95        suit were filed for transmission and delivery and the cause of action accrued, the defendant was not engaged in the business of operating its telegraph system, but that said system was, and still is, being operated solely by the Government of the United States under the direction of the Postmaster General of the United States, and to permit this suit to be maintained against this defendant would deprive it of its property without due process of law and would deny to it the equal protection of the laws in violation of the fifth and fourteenth amendments to the Federal Constitution." The refusal of this motion was made one of the grounds of the fourth exception to this Court. Your petitioner also raised the same contention by its fifth exception, which questions the correctness of the ruling of the trial judge in his charge to the jury. Answering this contention of your petitioner so made in its exceptions, this Court makes the following ruling:

"As judgments recovered in actions, in form, against the telegraph companies are to be paid by the Postmaster General, it can not be successfully contended that the recovery in this case will deprive the defendant of its property, without due process of law."

This conclusion on the part of the Court, however, in the judgment of your petitioner, does not meet the contention that the effect of rendering a judgment against it in this case is to deprive it of its property without due process of law, in violation of the fifth and fourteenth amendments to the Constitution of the United States. It is true, the Court states that the judgment is in form against your petitioner but in effect against the Postmaster General. Under the

decisions of the Supreme Court of the United States hereinbefore referred to, the judgment has absolutely no force whatever against the Postmaster General of the United States for the obvious reason that no Federal statute has ever authorized any judgment to be re-

covered against him in a state court, and therefore as to him  
96 the judgment was rendered by a court that was wholly devoid of jurisdiction. In the absence of any Federal statute authorizing a suit to recover a judgment that would be effective against the property of the United States Government in the hands of its Postmaster General, such judgment, instead of being in effect against such official and the property in his charge, is a nullity. The judgment, however, is in form, under the ruling of the Court, against your petitioner, Western Union Telegraph Company. Its lien, therefore, operates on the property of that company and as has been shown, is wholly inoperative against any property of the Federal Government. This Court, it is therefore respectfully submitted, has entirely overlooked the fact that the judgment, which is has affirmed, operates, and can only operate, against the property of the corporation, and that there is nothing whatever in the record to prevent the plaintiff from issuing an execution against the property of the corporation in South Carolina to collect such judgment. The effect of the decision, therefore, may be stated thus:

Suit is brought against Western Union Telegraph Company for the acts of the Federal Government and a judgment is rendered against that company, which judgment is an absolute lien on its property and is not a lien on any property of the Postmaster General, for the obvious reason that the state court was without any power whatever to render any judgment that would bind such official or the property in his charge. The plaintiff in such suit to collect his judgment has the absolute right to levy upon the property of the corporation and it can make no defense whatever, but must pay up such judgment that is really the debt of another person, over whom the court issuing the execution not only did not have, but could not have, either any jurisdiction or any control. The property of the telegraph company under such a judgment is therefore rendered ab-

solutely liable for the acts of another, and that other the sov-  
97 ereign Government of the United States, for which it was not at all responsible. Its property is thus taken to pay the debts of another and it is left to the uncertainty of being able to recover from the Government in a proceeding for reimbursement before the Court of Claims in Washington.

The contract introduced in evidence, it is true, declares that the Postmaster General would indemnify the telegraph company against judgments, but this means, and can only mean, that such indemnity would only obtain in cases where the court rendering the judgment had jurisdiction of the subject-matter of the action and of the person of the real defendant, namely, the Postmaster General himself. Therefore, it necessarily follows that a judgment rendered in a state court which was without any jurisdiction of the real party in interest, to-wit, the Postmaster General, or of the subject-matter of the action,

would not be the subject of such indemnity and the whole matter would have to be tried over in the Court of Claims. The result would be that upon the proceeding brought by your petitioner for reimbursement in the Court of Claims, the Government would promptly take the position that this was not such a judgment as was contemplated in the contract, that it was not, and could not be held liable in the court that rendered such judgment, and therefore reimbursement would be adjudged against your petitioner.

It may be that one person can be held liable for the debt of another and as a substitute for such liability, be given the remedy of a proceeding for indemnity against that other, when all of the matters are to be determined in the same court, but no principle either of abstract justice or of fundamental law will allow one person to be held liable for damages in one court for the debt of another and such liability be excused on the ground that he has a right of action against that other in a wholly different court. Surely, if the Con-

stitutional guarantees against the deprivation of a person of  
98 his property without due process of law, set forth in the fifth and fourteenth amendments to the Constitution of the United States, mean anything, they mean that both legislatures and courts are without the power to hold a defendant in the situation of your petitioner liable for the acts of another person, compel it to pay for such acts and then be remitted for redress to a court of an entirely separate and distinct jurisdiction, where it may never receive one cent by way of reimbursement. As has been said, if this court had jurisdiction of the present action as well as the suit for reimbursement and could determine the entire rights of all parties, there might be some semblance of due process of law in compelling the defendant to pay this judgment to plaintiff, and then proceed in the same court against the Government for indemnity, but of the constitutionality of even such an action, your petitioner respectfully submits, that it has the gravest doubts. Where the courts are entirely separate and distinct, however, and the judgment is rendered against your petitioner and the right of execution to collect such judgment existing in favor of the plaintiff is against its property and its property alone, then it would seem too obvious for argument that its right to a suit for reimbursement in a court of a wholly distinct and separate jurisdiction would not, and could not, save the action of the state court in making it liable for the default of another from being obnoxious to the due process of law clauses of the Constitution of the United States. In a nut shell, the contention of your petitioner is that under the fifth amendment, there was no power in Congress to make it liable and suable for the acts of the Federal Government, and similarly under the fourteenth amendment, there was no power in a state court to make it liable and suable for the acts of the Federal Government. Such a result would be against fundamental prin-

ciples of justice as well as Constitutional guarantees, which  
99 can neither be overturned by legislative fiat nor disregarded by judicial decree. The principle for which your petitioner contends is thus stated in the recent case of *Haubert vs. B. & O. R. Co.*, 259 Fed. 361:

"Manifestly, it seems to me that in view of these conditions no liability exists against the railroad company itself for a personal injury due to operation under federal control, and that no judgment can be rendered therefor which will become a lien upon the corpus of its property or payment compelled therefrom. If this were done, the result would be that one person's property would be taken without his consent and without compensation to pay the debt of another. Liabilities thus arising during federal control, it must be conceded, are in substance debts of the United States, notwithstanding, for purposes of administration, the control and operation of the railroads have been vested in an official called the Director General of Railroads. An action against the Director General, based upon any contract or act of his, it may be admitted, is, in effect, a suit against the United States. See opinion of Rugg, C. J., in *Public Service Commission v. New England Telegraph & Telephone Co.*, 232 Mass. 465, 122 N. E. 567, affirmed United States Supreme Court June 2, 1919, in *MacLeod et al. v. New England Telephone & Telegraph Co.*, 250 U. S. 195, 39 Sup. Ct. 511, 63 L. Ed. —; also *Northern Pacific Railway Co. v. State of North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. —, in United States Supreme Court, decided June 2, 1919, and cases cited."

The same principle was stated and applied in the recent case of *Schumacher vs. Pennsylvania R. Co.*, 175 N. Y. Sup. 85.

Other authorities to the same effect are:

*Attorney General vs. Old Colony R. Co.*, 22 L. R. A. 112.

*Colon vs. Lisk*, 60 Am. St. Rep. 609.

*Knoxville Traction Co. vs. McMillan*, 65 L. R. A. 296.

*Ohio, etc. R. Co. vs. Lackey*, 20 Am. Rep. 259.

*Missouri, etc. R. Co. vs. Nebraska*, 164 U. S. 403, 41 L. Ed. 489.

*Daugherty vs. Thomas*, 45 L. R. A. (New Series) 699.

If the principles herein contended for by your petitioner are sound, they are directly applicable to the facts of the present case, and upon being properly applied, would prevent the affirmance of the present judgment against your petitioner, as such affirmance would operate to deprive it of its property without due process of law.

100 The precise question that is involved in the present case recently came before the Supreme Court of Alabama and on the authority of the same decisions herein referred to, that court, in a unanimous opinion, held that the action could not be maintained against the telegraph company for the acts of the Government.

The court, in the course of its opinion, declared that under the *Dakota Central Telephone Company* case, the possession of the telegraph property by the Government was exclusive and that any action brought against the company during the operation of such telegraph lines was an action against the Government itself and could not be maintained in a state court. This conclusion, it is respectfully sub-



mitted, would seem to be the only conclusion possible under the decisions of the Supreme Court of the United States that control the question of liability in such cases. A copy of this decision of the Supreme Court of Alabama is herewith appended and made a part of this petition, and to it your petitioner would direct special attention.

Summing up what has been said, your petitioner respectfully contends that a rehearing should be granted it because the Court has overlooked matters both of law and of fact that are of such moment that if properly applied would require a reversal of the judgment in the case. The principles in question may be stated thus:

1. The judgment cannot be against the Western Union Telegraph Company in form, but in effect against the Postmaster General, for the reason that the Postmaster General, that is to say, the Government of the United States, is the real party in interest, and no authority having been granted by Congress to the state courts to entertain actions of this character against the government or the Postmaster General, its official, the state courts are wholly without jurisdiction

to render any judgment that is effective against the Postmaster General.

2. Neither the proclamation of the President nor the order of the Postmaster General contemplated suits in any court. The contract between the Postmaster General and the company indemnifies the latter against suits, but this indemnity provision of the contract did not confer jurisdiction on the state courts; and even if the attempt had been made by such provision to confer such jurisdiction, it would have been an *ultra vires* on the part of the Postmaster General as Congress alone possesses the power to confer jurisdiction of such actions on the state courts.

3. The judgment in this case is against the Western Union Telegraph Company, is a lien on its property, and can be collected by an execution levied on such property. Such being the force of the judgment, it operates to compel the telegraph company to pay the debt of the Government, and thereby deprives the telegraph company of its property without due process of law in violation of the fifth and fourteenth amendments to the Federal Constitution.

Wherefore, your petitioner prays that it have leave to file this petition, that the remittitur herein be stayed, and that upon consideration of the grounds hereinbefore set forth, it be granted a rehearing of the cause.

And your petitioner will ever pray, etc.

WILLCOX & WILLCOX,  
FRANCIS H. WESTON,

*Attorneys for Petitioner.*

I, J. P. McNeill, hereby certify that I am a duly licensed practicing attorney of the State of South Carolina, enrolled as such in the Supreme Court of the State; that I have carefully examined all



the grounds of the foregoing petition, and that I verily believe that there is merit therein.

I hereby further certify that I am not of counsel in the cause and am in no way concerned therein.

J. P. McNEILL.

102 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, October Term, 1919.

S. B. POSTON, Respondent,

versus

WESTERN UNION TELEGRAPH COMPANY, Appellant.

Appeal from Williamsburg County.

Hon. W. H. Townsend, Judge.

*Order.*

The appellant in this cause, by its counsel, Willcox and Willcox and Francis H. Weston, having presented a petition for a rehearing of said cause, it is, upon consideration of said petition,

Ordered That the said petition be filed and that the remittitur herein be stayed until the further order of this Court.

(Signed)

D. E. HYDRICK,

A. J.

Feb'y 4, 1920.

103 STATE OF SOUTH CAROLINA:

In the Supreme Court,

S. B. POSTON, Respondent,

vs.

WESTERN UNION TELEGRAPH Co., Appellant.

Petition dismissed and stay order revoked.

EUGENE B. GARY, C. J.

D. E. HYDRICK, A. J.

R. C. WATTS, A. J.

T. B. FRASER, A. J.

GEO. W. GAGE, A. J.

Filed Feb. 23, 1920.

HARRY McCRAW,

Clerk.

## 104 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, October Term, 1919.

S. B. POSTON, Respondent,

VERSUS

WESTERN UNION TELEGRAPH COMPANY, Appellant.

Appeal from Williamsburg County.

Hon. W. H. Townsend, Judge.

*Petition.*

To the Honorable the Supreme Court of the State of South Carolina:

Your petitioner, Western Union Telegraph Company, respectfully shows:

1. That on the 27th day of January, 1920, this Honorable Court rendered a decision in the above entitled cause, wherein and whereby it affirmed the judgment rendered by the lower court against your petitioner, and thereafter on the 5th day of February, 1920, your petitioner filed a petition in this Honorable Court praying for a reargument of the cause, which said petition for reargument was refused and the judgment made final by an order of the Court filed on the 23d day of February, 1920.

2. That in the appeal to this Court, your petitioner set up and claimed that under the joint resolution of Congress, dated  
105 July 16, 1918, and the proclamation of the President, dated July 22, 1918, assuming control and possession of all telegraph lines, this action could not be maintained against it, as the real party in interest was the Government of the United States and the State courts were without jurisdiction to try such action, and that to permit the action to be maintained against it would deprive it of its property without due process of law and would deny to it the equal protection of the laws, in violation of the fifth and fourteenth amendments to the Constitution of the United States; and that the decision of this Court, affirming the judgment rendered by the lower court against your petitioner and thereby holding your petitioner liable to the plaintiff, was against the right, title, privilege or immunity so claimed by it under the Constitution, the joint resolution of Congress and the proclamation of the President.

3. That under the provisions of Section 237 of the Judicial Code of the United States, as amended by the Act of September 6, 1916 (39 Stat. L. 726), your petitioner is entitled to apply to the Supreme Court of the United States, within ninety days, for a writ of certiorari to this Honorable Court in order to have reviewed the decision of this Honorable Court against such title, right, privi-

lege or immunity so claimed by it under the Constitution of the United States, the joint resolution of Congress and the proclamation of the President.

Wherefore, your petitioner prays that the remittitur herein be stayed for ninety days from the date hereof in order that it may apply to the Supreme Court of the United States for a writ of certiorari, pursuant to the provisions of Section 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. L., 726).

And your petitioner will ever pray, etc.

WILCOX & WILCOX,  
FRANCIS H. WESTON,  
*Attorneys for Petitioner.*

106 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, October Term, 1919.

S. B. POSTON, Respondent,

versus

WESTERN UNION TELEGRAPH COMPANY, Appellant.

Appeal from Williamsburg County.

Hon. W. H. Townsend, Judge.

*Order.*

Upon hearing the petition of Western Union Telegraph Company in this action for a stay of remittitur, pending its application to the Supreme Court of the United States for a writ of certiorari and upon motion of Wilcox & Wilcox and Francis H. Weston, attorneys for said petitioner, it is

Ordered that the remittitur herein be, and the same is hereby, stayed for a period of ninety days from the date hereof, in order to allow the petitioner, Western Union Telegraph Company, to present and file in the Supreme Court of the United States its petition for a writ of certiorari, pursuant to the provisions of Section 237 of the Judicial Code of the United States as amended by the Act of September 6, 1916 (39 Stat. L., 726).

(Signed)

ENGINEER B. GARY,  
*Chief Justice.*

23 Feb'y, 1920.

## 107 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

S. B. POSTON, Plaintiff-Respondent,  
against

WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant.

I, Harry McCaw, Clerk of the Supreme Court of the State of South Carolina, do hereby certify that the foregoing is a true and correct copy of the record and proceedings, and the whole thereof, in the case of S. B. Poston, Plaintiff-respondent, versus Western Union Telegraph Company, Defendant-appellant, as appears by the records now on file in my office.

Given under my hand and seal of said Court at Columbia, South Carolina, this 12th day of March, 1920.

[Seal Supreme Court of South Carolina.]

HARRY McCAW,  
*Clerk of the Supreme Court of  
the State of South Carolina.*

[Endorsed:] Supreme Court of the United States. Western Union Telegraph Company, Petitioner, versus S. B. Poston, Respondent. Transcript of Record. Law offices Willcox & Willcox, Florence, S. C.

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of South Carolina, Greeting:

Being informed that there is now pending before you a suit in which Western Union Telegraph Company is appellant, and S. B. Poston is appellee, which suit was removed into the said Supreme Court by virtue of an appeal from the Court of Common Pleas of Williamsburg County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of May, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,  
*Clerk of the Supreme Court of the United States.*

[Endorsed:] File No. 27,588. Supreme Court of the United States, No. 833, October Term, 1919. Western Union Telegraph Company vs. S. B. Poston. Writ of Certiorari.

In the Supreme Court of the United States, October Term, 1919.

No. 833.

WESTERN UNION TELEGRAPH CO., Petitioner,

v.

S. B. POSTON,

*Stipulation as to Return to Writ of Certiorari.*

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the Supreme Court of South Carolina, to the writ of certiorari granted therein.

HENRY E. DAVIS,  
*Counsel for Petitioner.*  
PHILIP H. ARROWSMITH,  
*Counsel for Respondent.*

I, Harry McCaw, Clerk of the Supreme Court of South Carolina, certify that the above is a true copy of original stipulation as to return to Writ of Certiorari in case of Western Union Telegraph Company, Petitioner vs. S. B. Poston, filed in office of the Clerk of the Supreme Court of South Carolina, 4th May, 1920.

Witness my hand and Seal of the Supreme Court of South Carolina, at Columbia, this 14th day of May, A. D. 1920.

[Seal Supreme Court of South Carolina.]

HARRY McCAW,

*Clerk Supreme Court of South Carolina.*

[Endorsed:] 833/27,588. In the Supreme Court of the United States. Western Union Telegraph Co., Petitioner, vs. S. B. Poston. Stipulation. Copy. Law Offices Willecox & Willecox, Florence, S. C.

[Endorsed:] File No. 27,588. Supreme Court U. S., October Term, 1919. Term No. 293. Western Union Telegraph Co., Petitioner, vs. S. B. Poston. Writ of certiorari and return. Filed May 22, 1920.

**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1919.**

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**No.**

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**WESTERN UNION TELEGRAPH COMPANY,**

**PETITIONER,**

*versus*

**S. B. POSTON, RESPONDENT.**

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**PETITION UNDER PROVISIONS OF SECTION 237 OF  
THE JUDICIAL CODE AS AMENDED BY THE ACT OF  
SEPTEMBER 6, 1916 (39 STAT. AT L., 726), FOR WRIT  
OF CERTIORARI TO THE SUPREME COURT OF  
SOUTH CAROLINA, AND BRIEF IN SUPPORT  
THEREOF.**

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**PETITION.**

*To the honorable the Supreme Court of the United States:*

Now comes Western Union Telegraph Company, petitioner, respectfully representing that it is aggrieved by a final judgment of the Supreme Court of the State of South Carolina, passed and entered on the 23d day of February, A. D. 1920, in a certain cause then pending, wherein your petitioner, Western Union Telegraph Company, was appellant

and S. B. Poston was respondent, being No. 27 of the October term, 1919, of said court; that the matters at issue in said cause are of peculiar gravity and importance in that they involve (1) the right of your petitioner, and also of all other telegraph and telephone companies similarly situated, to exemption from liability for the acts of the Postmaster General of the United States and of his agents, servants, and employees during the period its telegraph system was in the exclusive and complete possession and control of the United States and was being operated by the United States under the provisions of Joint Resolution of Congress No. 834, adopted July 16, 1918, and the proclamation of the President issued pursuant thereto July 22, 1918, and (2) the non-existence of any right on the part of any individual citizen to recover against your petitioner, or any other telegraph or telephone company similarly situated, on a cause of action arising out of a transaction had with the Postmaster General of the United States in his possession, control, and operation of the wire lines; that the judgment of said Supreme Court of South Carolina here complained of holds that your petitioner is liable for the aforesaid acts of the Postmaster General of the United States and his agents, servants, and employees under the circumstances stated; that, as will appear from a consideration of the brief hereto annexed in support of this petition, the said judgment is contrary to the decisions of this court determining the status of the wire companies with respect to their properties during the period of Government control and operation under the war measures adopted by Congress and the actions of the President pursuant thereto, the decisions of this court holding that no suit can be maintained against the United States or one of its officials, either directly or indirectly, without its consent, and the decisions of this court enforcing the due process of law clauses of the Fifth and Fourteenth Amendments to the Federal Constitution; wherefore, in order that its rights, as well as those of



other wire companies, may be authoritatively ascertained and declared respecting causes of action accruing during the period of Government possession, control, and operation, petitioner prays the issuance of a writ of certiorari herein, as provided by law.

The particular facts and grounds upon which this application is based are as follows:

On October 2d and 3d, 1918, certain telegrams passed between the respondent, S. B. Poston, at Johnsonville, South Carolina, and W. B. Ravenel & Company, cotton brokers in Charleston, South Carolina, for the purpose of effecting a sale of two hundred bales of cotton. Alleging that in response to his inquiry an offer for the cotton had been made by the brokers, but that by reason of delay in transmitting the offer and the acceptance thereof, he had lost a sale of the two hundred bales of cotton at the price quoted and was compelled, by reason of a decline in the market, subsequently to sell the cotton at a reduced price, the respondent commenced this action against the petitioner, Western Union Telegraph Company, in the Court of Common Pleas for Williamsburg County, South Carolina, to recover as damages the difference between the price offered and the price at which he actually sold the two hundred bales of cotton. The telegraph company, as defendant in the action, answered the complaint, and, besides pleading in substance a general denial and a specific denial that it was operating a telegraph line at the time the cause of action accrued, alleged by way of affirmative defense that under Joint Resolution of Congress No. 834, adopted July 16, 1918, the proclamation of the President, dated July 22, 1918, and the orders of the Postmaster General, its entire system was taken over by the United States and at the time the cause of action accrued was being operated exclusively by the United States.

In due course the case came on for trial in the lower court and the defendant saved all of its rights and conten-

tions as to its non-liability by appropriate objections to testimony and requests for instructions in its favor. All of its contentions having been overruled, a verdict in favor of the plaintiff was duly rendered, judgment was thereupon entered, and an appeal was prosecuted to the Supreme Court of the State.

In this appeal your petitioner, the defendant therein, contended (1) that the possession, control and operation of its telegraph system by the United States at the time the cause of action accrued was such under the Federal Constitution, the acts of Congress, and the proclamation of the President as to prevent the maintenance of this suit against it, because such possession, control, and operation on the part of the United States was in its sovereign capacity and was so complete and exclusive as to leave no ground upon which to base liability of the defendant, and, the United States being the real party in interest, the suit could not be maintained against the United States in a State court, but, under the provisions of the Federal statutes, could only be maintained in the district court or the Court of Claims of the United States, and (2) that the complete and exclusive possession, control, and operation of its telegraph system by the United States in its sovereign capacity precluded any liability on the part of the defendant, for the reason that to hold otherwise would deprive defendant of its property without due process of law and deny to it the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments to the Federal Constitution. All of these contentions on the part of the defendant were overruled by the court and the judgment below against your petitioner was thereby affirmed on January 30, 1920, the court stating in its decision that the judgment was in form against Western Union Telegraph Company, but in effect against the United States, and that by reason of this fact the telegraph company could not successfully contend that in paying such judgment it would be deprived of its property without due process of law, as it

would have the right to appeal to the United States for reimbursement. A motion for rehearing was promptly made, which was overruled by an order filed on February 23, 1920.

Your petitioner represents that said judgment of the Supreme Court of South Carolina is erroneous, as it is not liable on causes of action arising out of the operation of its properties by the United States and cannot be held liable on such causes of action consistently with the due process of law clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States; that upon such judgment its property can be seized and sold and it compelled to pay the same out of its funds, and its reimbursement would depend upon the decision of the United States as to whether it was liable to reimburse petitioner, and therefore that the judgment, if enforced, would take its property to pay the debt of another, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States; and, further, that no private citizen has the right to recover a judgment against it that will be effective against the United States, as no consent has ever been given to sue the Postmaster General or the United States, either directly or indirectly, in the State courts; that this is one of a large number of similar suits that have been instituted and are now pending against your petitioner in various State courts throughout the United States on causes of action accruing during the period of Government possession, control, and operation, and your petitioner is advised that a large number of like suits have also been brought and are now pending on similar causes of action arising during their operation by the United States against the various other wire companies similarly situated in the United States; that in order that there may be a proper adjustment and settlement of all matters arising between the petitioner and all other wire companies and the United States Government with respect to claims arising during the period of Government possession and control and growing out of the operation of their prop-

erties by the United States, it is essential that this court declare and establish a uniform rule governing these matters for the guidance both of the wire companies and the United States, and that without such uniform rule these matters, of the gravest general importance, must be left for their determination to the conflicting adjudications of the various State courts.

Wherefore, because and by reason of the general interest in and the general importance of the issues involved, and for the other reasons above stated, your petitioner prays that a writ of certiorari to review the cause be issued to said Supreme Court of South Carolina, as in such case is provided by section 237 of the Judicial Code as amended by the act of September 6, 1916 (39 Stat. at L., 726).

WESTERN UNION TELEGRAPH  
COMPANY.

*Petitioner.*

By RUSH TAGGART,  
FRANCIS R. STARK,  
P. A. WILLCOX,  
F. L. WILLCOX,  
HENRY E. DAVIS,

*Its Attorneys.*

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**BRIEF.**

The wire systems were taken over by the Government under Joint Resolution of Congress No. 834, adopted July 16, 1918, President's proclamation, July 22, 1918, and Postmaster General's Order No. 1783, issued August 1, 1918, and continued in the possession and control of the Government until August 1, 1919. The cause of action involved in this suit accrued October 3, 1918, at which time the Western

Union Telegraph Company had ceased its functions and obligations as a carrier, and its agents, employees, and servants had become those of the United States, and its telegraph system was being operated by the Postmaster General on behalf of the United States.

Such being the facts, the real questions are (1) whether the Western Union Telegraph Company, and other wire companies similarly situated, can be held liable to the sender of a telegram for a delay in its transmission and delivery when it appears that the contract made by such sender was with the agents and employees of the Postmaster General of the United States and at a time when the telegraph system of such company was in the possession and control and was being operated by the United States through the Postmaster General, and (2) whether an individual citizen has the right to recover against the Western Union Telegraph Company, or any other wire company similarly situated, on a cause of action growing out of the operation of its telegraph system and accruing during the period of Federal possession and control, a judgment in the State courts which will be effective and operative against the United States when neither consent to bring nor jurisdiction to maintain in the State courts such indirect suit against the United States has ever been given. In its opinion filed herein, the Supreme Court of the State has affirmed the existence of such liability against the defendant and of such right in favor of a private citizen, and by this application the petitioner seeks a review of such conclusions. Without unnecessary elaboration, the principles that demonstrate the error of the court's conclusion may be thus stated:

1. The effect of the Congressional and Presidential action in taking over the wire systems was "not a mere public supervision of an operation by private owners." On the contrary, it was an absolute, complete, and exclusive possession, control, and operation of such systems by the Federal Govern-

ment in its sovereign capacity, to the exclusion of all state action and of every private interest.

*North Pacific R. Co. vs. North Dakota ex rel. Langer*, 250 U. S., 135.

*Dakota Central Tel. Co. vs. South Dakota ex rel. Payne*, 250 U. S., 163.

*Burleson vs. Dempsey*, 250 U. S., —.

*Public Service Commission vs. N. E. Tel. & Tel. Co.* (Mass.), 122 N. E., 567, affirmed in *McLeod vs. N. E. Tel. & Tel. Co.*, 250 U. S., 195.

Therefore the Western Union Telegraph Company was in no way concerned with the transmission of the telegrams involved in the suit and no liability can exist against it, as the owner of the system over which the Government handled the messages, unless imposed by the joint resolution and the proclamation pursuant thereto.

2. The joint resolution of July 16, 1918, and the proclamation pursuant thereto do not impose nor attempt to impose liability upon the telegraph companies for the acts of the agents, servants, and employees of the Postmaster General of the United States. Hence the Western Union Telegraph Company is neither liable nor suable for the acts of the Postmaster General and his agents, servants, and employees.

*Dakota Central Tel. Co. vs. South Dakota ex rel. Payne*, 250 U. S., 163.

*Public Service Commission vs. N. E. Tel. & Tel. Co.* (Mass.), 122 N. E., 567, affirmed in *McLeod et al. vs. N. E. Tel. & Tel. Co.*, 250 U. S., 195.

*S. W. Bell Tel. Co. vs. State* (Okla.), 181 Pac., 487.

*State ex rel. Attorney General vs. Wisconsin C. Tel. Co.* (Wis.), 172 N. W., 225.

*S. W. Tel. & Tel. Co. vs. Houston*, 256 Fed., 690.

*Florida ex rel. R. R. Commission vs. Postmaster General et al.*, 255 Fed., 604.

*State ex rel. Collins vs. Cumberland Tel. & Tel. Co.* (Miss.), 81 Southern, 404, and 82 Southern, 311.

*Canidate vs. Western Union Tel. Co.* (Supreme Court of Alabama)—not yet reported.

Notwithstanding the broader scope and the more elaborate provisions, including one respecting suits, of the congressional legislation in respect to the transportation lines, the decisions on Federal control of railroads all establish the non-liability of the corporations for the acts of the employees of the Director General. Hence they strongly sustain the position that the wire companies cannot be held liable for the acts of the Postmaster General and his agents, servants, and employees.

*Northern Pacific R. Co. vs. North Dakota ex rel. Langer*, 250 U. S., 135.

*Rutherford vs. Union Pac. R. Co.*, 254 Fed., 880.

*Southern Cotton Oil Co. vs. A. C. L. R. R. Co.*, 257 Fed., 143.

*Hatcher vs. Atcheson, etc., R. Co.*, 258 Fed., 952.

*Haubert vs. B. & O. R. Co.*, 259 Fed., 361.

*Nash vs. Southern Pacific Co.*, 260 Fed., 280.

3. Not only is the Western Union Telegraph Company, under the joint resolution and the proclamation, neither liable nor suable in the State courts with respect to the matters here complained of, but it is neither the principal nor the master of the Postmaster General's agents and servants, and is therefore under no theory responsible for their acts. On the contrary, the recovery had against it in this case is a recovery in a case where only the United States, if anyone, is responsible, and where the United States, or its representative, the Postmaster General, was the real party in interest. Neither the United States nor its Postmaster General could be sued in such a case without consent granted by an act of Congress, and the only consent ever given by Congress to suits of any character against the United States is found in section 24, paragraph 20 (conferring jurisdiction on the United States District Court), and section 145 (conferring jurisdiction on the Court of Claims) of the Judicial Code.

Since the real party in interest was the United States, or its representative, the Postmaster-General, the State courts could not in the guise of awarding judgment against the corporation, which was in no way concerned with the matters in controversy, render a judgment effective against the United States or its Postmaster-General, as such courts were wholly devoid of any jurisdiction of either the person of the real defendant or the subject-matter of the action. The rendering of such a judgment is a palpable attempt on the part of the State courts to interfere with the United States Government behind its back, and this cannot be done.

*Northern Pacific R. Co. vs. North Dakota ex rel. Langer*, 250 U. S., 135.

*Wells vs. Roper*, 246 U. S., 335; 62 L. ed., 755.

*Louisiana vs. McAdoo*, 234 U. S., 627; 58 L. ed., 1506.

*United States ex rel. Goldberg vs. Daniels*, 231 U. S., 218; 58 L. ed., 191.

*Louisiana vs. Garfield*, 211 U. S., 70; 53 L. ed., 92.

*Kansas vs. United States*, 204 U. S., 331; 51 L. ed., 510.

*Naganab vs. Hitchcock*, 202 U. S., 473; 50 L. ed., 1113.

*Oregon vs. Hitchcock*, 202 U. S., 60; 50 L. ed., 935.

*International Postal Supply Co. vs. Bruce*, 194 U. S., 601; 48 L. ed., 1134.

*Minnesota vs. Hitchcock*, 185 U. S., 373; 46 L. ed., 954.

*Belknap vs. Schild*, 161 U. S., 10; 40 L. ed., 599.

*Ex parte Ayers*, 123 U. S., 443; 31 L. ed., 216.

4. The entire systems of the telegraph companies having been seized *in invitum*, the joint resolution would violate the Fifth Amendment to the Federal Constitution if it imposed liability upon the companies for acts committed by the United States and its agents during the period of Gov-



ernment possession, control, and operation, because it would thereby mulct the corporations for the debts of the United States and authorize the taking of their property for the private use of persons whose real claims were against the United States, and would thus deprive such corporations of their property without due process of law.

*Schumacher vs. Penn. R. Co.*, 175 N. Y. S., 84.

*Missouri, etc., R. Co. vs. Nebraska*, 164 U. S., 403.

*Mo. Pac. R. Co. vs. Nebraska*, 217 U. S., 196.

*St. Louis, etc., R. Co. vs. Wynn*, 224 U. S., 354.

*Ochoa vs. Hernandez*, 230 U. S., 139.

*Chicago, etc., R. Co. vs. Polt*, 232 U. S., 165.

*Haubert vs. Baltimore, etc., R. Co.*, 259 Fed., 361.

*Daugherty vs. Thomas (Mich.)*, 45 L. R. A. (N. S.), 699.

*Attorney General vs. Old Colony R. R. Co. (Mass.)*,  
22 L. R. A., 112.

*Colon vs. Lisk (N. Y.)*, 60 Am. St. Rep., 609.

*Knoxville Traction Co. vs. McMillan (Tenn.)*, 65  
L. R. A., 296.

In the recent case of *Nash vs. Southern Pacific Co.*, 280 Fed., 280, the court, in ruling on the identical question under the act applying to railroads, said:

"But that it was intended as the purpose of section 10, as urged by plaintiff, to authorize suits against the owners of these properties in causes of action arising out of transactions had with the Federal Railroad Administration, or through torts committed by its agents while under its control—things for which, we repeat, the owners could be in no way responsible—may not for a moment be indulged; such a construction would clearly render the provision obnoxious to the objection of authorizing the taking of property without due process of law, a purpose which may not be imputed to Congress."

5. The entire systems of the telegraph companies having been seized *in invitum* and the Joint Resolution not having attempted to impose any liability upon the companies for acts committed by the United States and its agents during the period of Government possession, control and operation, the action of the State courts in imposing such liability upon the petitioner violates the provisions of the Fourteenth Amendment to the Federal Constitution, as it compels such corporation to pay the debts of the United States and authorizes the taking of its property for the private use of a person whose real claims are against the United States, and thus deprives it of its property without due process of law and denies to it the equal protection of the laws.

*Chicago, etc., R. Co. vs. Chicago*, 166 U. S., 226.

The precise question involved in the present case has recently been decided by the Supreme Court of Alabama in the case of *Candidate vs. Western Union Telegraph Company* (not yet reported), by the Court of Appeals of Alabama in the case of *Western Union Telegraph Company vs. Glover* (not yet reported), by the Court of Civil Appeals of Texas in the case of *Western Union Telegraph Company vs. Wallace* (not yet reported), by the Supreme Court of Arkansas in the case of *Davis vs. Western Union Telegraph Company* (not yet reported), and by the Springfield (Missouri) Court of Appeals (not yet reported). In each of these cases, the court, in a unanimous opinion, held that the suit could not be maintained against the telegraph company, as the right of action, if any, was against the United States alone. It thus appears that the decision of the Supreme Court of South Carolina is not only opposed to the principles established and applied by the Federal courts in numerous similar cases, but is also opposed to direct adjudications of the courts of other States on the identical question.

For the foregoing reasons, it is respectfully submitted, a writ of certiorari should be granted.

RUSH TAGGART,  
FRANCIS R. STARK,  
P. A. WILLCOX,  
F. L. WILLCOX,  
HENRY E. DAVIS,  
*Attorneys for Western Union  
Telegraph Company.*

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**Notice.**

To S. B. Poston and  
Arrowsmith, Muldrow, Bridges & Hicks,  
Attorneys of Record:

Take notice that on Monday, March 29, 1920, at 12 o'clock noon, the above petition for certiorari and brief accompanying the same will be submitted to the Supreme Court of the United States for its consideration and action.

RUSH TAGGART,  
FRANCIS R. STARK,  
P. A. WILLCOX,  
F. L. WILLCOX,  
HENRY E. DAVIS,  
*Attorneys for Petitioner.*

Service of the foregoing notice and receipt of copy of the petition for writ of certiorari and brief attached thereto is hereby acknowledged this 12th day of March, 1920.

ARROWSMITH, MULDROW,  
BRIDGES & HICKS,  
*Attorneys for S. B. Poston.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1919.

WESTERN UNION TELEGRAPH COMPANY,  
petitioner,

v.

S. B. POSTON.

No. 833.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF SOUTH CAROLINA.

## SUGGESTIONS OF THE UNITED STATES RELATIVE TO THE GRANTING OF THE WRIT.

Comes now the Solicitor General on behalf of the United States and makes the following suggestions relative to the granting of a writ of certiorari in the above-entitled cause:

In November, 1918, while the telegraph lines of the petitioner herein were being operated by the United States as hereinafter stated, the respondent herein filed in the Court of Common Pleas for Williamsburg County, South Carolina, a suit against said petitioner to recover damages alleged to have been sustained on account of the loss of a sale of certain cotton by reason of the alleged delay of said petitioner in delivering certain telegrams relating to said sale. A verdict and judgment for the sum of \$1,548.15 having been entered in favor of the plaintiff, an appeal was taken by the

telegraph company to the Supreme Court of South Carolina, wherein the judgment of the trial court was affirmed.

The acts and things complained of in said suit occurred during the period that the telegraph systems of the country, including the lines of said petitioner, were under the control and operation of the Postmaster General acting on behalf of the United States, pursuant to the joint resolution of Congress adopted July 16, 1918, the Presidential proclamation of July 22, 1918, and the order of said Postmaster General dated August 1, 1918.

A contract had been entered into between the Postmaster General and the petitioner on October 9, 1918, wherein it was provided, among other things, that (R. 61):

The Postmaster General shall pay, or save the owner harmless from all expenses incident to, or growing out of the possession, operation and use of the property taken over during the period of Federal control. He shall also pay, or save the owner harmless from all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon it, by reason of any cause of action arising out of Federal control, or anything done or omitted in the possession, operation, use or control of its property, during the period of Federal control, except judgments or decrees founded on obligations of the owner to the Postmaster General of the United States.

The defendant telegraph company pleaded in said case that it was not subject to suit for causes arising during Government operation; that the suit if maintained against it was in effect against the United States, which had not consented to be sued, nor authorized petitioner to be sued on causes so originating. Said State courts held that said telegraph company could be sued for such causes, and in effect the Supreme Court of South Carolina holds that this can be done by reason of the above-quoted clause of said contract between petitioner and the Postmaster General.

The United States is advised that the telegraph company will claim that it (the United States) should reimburse the petitioner on account of the judgment herein if said petitioner is compelled to satisfy the same. In view of the fact that similar suits have been instituted and are now pending in the various State courts throughout the country against the petitioner and other wire companies in which the cause of action accrued during the period of Federal operation of such telegraph lines, which suits would be controlled largely by a decision of this court in the instant case, the United States respectfully begs leave to join in the request that a writ of certiorari issue herein.

ALEX. C. KING,  
*Solicitor General.*

APRIL, 1920.

IN THE  
**SUPREME COURT OF THE UNITED STATES.**  
**OCTOBER TERM, 1919.**

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**No. 833.**

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WESTERN UNION TELEGRAPH COMPANY,  
PETITIONER,

*vs.*

S. B. POSTON,

---

ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF  
SOUTH CAROLINA.

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**MOTION BY THE PETITIONER TO ADVANCE.**

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Comes now the petitioner, The Western Union Telegraph Company, and respectfully moves that the above-entitled cause, in which a writ of certiorari was granted on April 26th last, be advanced for early hearing during the October, 1920, term of this court.

The question involved is whether the Western Union Telegraph Company can be held liable for failure to transmit, or error or delay in transmitting, messages handled over its wire system in the United States during the period between

August 1, 1918, and August 1, 1919, while its lines were in the exclusive and complete possession and control of the United States, and being operated by the United States, under the provisions of joint resolution of Congress No. 834, adopted July 16, 1918, and the proclamation of the President issued pursuant thereto July 22, 1918.

This question, so far as the Western Union lines are concerned, has been raised in over seven hundred actions at law, brought in various courts throughout the United States; and additional actions involving the same question are continuing to be brought from day to day. Over three hundred and fifty of these actions have been disposed of in favor of petitioner, on the ground that petitioner was not and could not be liable for the acts of the Government of the United States; and such has been the holding of courts of last resort in the States of Alabama, Arkansas, and Kentucky, and of appellate courts (though not the courts of last resort) in Missouri and Texas. No appellate court in any State, with the exception of the Supreme Court of South Carolina in the case at bar, has held that the petitioner is liable in such cases; but by reason of the decision of the Supreme Court of South Carolina in the present case the inferior courts in South Carolina are continuing and will continue to entertain such actions.

Notice of this motion has been served on opposing counsel.

RUSH TAGGART,  
FRANCIS R. STARK,  
P. A. WILLCOX,  
F. L. WILLCOX,  
HENRY E. DAVIS,

*Attorneys for Western Union Telegraph Company.*

The United States joins in the above request.

ALEX. C. KING,  
*Solicitor General.*